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NO. 22, ORIGINAL

In The

Supreme Court of the United States

October Term, 1965

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

NICHOLAS deB. KATZENBACH,
ATTORNEY GENERAL OF THE UNITED STATES,
Defendant.

BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA AMICUS CURIAE

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BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA AMICUS CURIAE

PRELIMINARY STATEMENT

On September 29, 1965, the State of South Carolina lodged in this Court a motion for leave to file its complaint against Nicholas deB. Katzenbach, Attorney General of the United States, attacking the constitutionality of the Voting Rights Act of 1965, Public Law 89-110. Annexed to the motion was South Carolina's complaint and its brief on behalf of the State. On November 5, 1965, this Court entered its order granting the above-mentioned motion, scheduling the filing of an answer and briefs by the respective parties and setting the cause for oral argument on January 17, 1966. In addition, the Court's order provided

(1) that any State might submit a brief, *amicus curiae*, on or before December 20, 1965, and (2) that any such State desiring to participate in the oral argument, as *amicus curiae*, should file with the Clerk of the Court a request for permission to do on or before the same date. Pursuant to the permission conferred by this order, the instant Brief on Behalf of the Commonwealth of Virginia, *Amicus Curiae*, is filed.

THE STATUTE INVOLVED AND THE INTEREST OF THE COMMONWEALTH OF VIRGINIA

Under consideration in this litigation is the Voting Rights Act of 1965, Public Law 89-110. Pertinent to a consideration of the positions taken by the Commonwealth of Virginia in the instant brief, *amicus curiae*, are the provisions of Section 4 of the Act which prescribe:

> SEC. 4. (a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under subsection (b) or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of five years after the entry of a final judgment of any court of the United

States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

(b) The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 6 or section 13 shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

(d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

(e) (1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that

a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

The interest of the Commonwealth of Virginia in this litigation arises from the circumstance that the Attorney General of the United States has determined—pursuant to Section 4(b) of the Act—that Virginia maintained on November 1, 1964, a "test or device" as defined in Section 4(c) of the Act, and the Director of the Census has similarly determined that less than 50 per centum of the persons of voting age residing in Virginia voted in the presidential election of November, 1964. Under Section 4(a) of the Act, the effect of these determinations has been to deprive the Commonwealth of Virginia of the right to require each of her citizens—without regard to race, color or previous condition of servitude—to make application to register to vote *in his own handwriting* as required by Section 20 of the Constitution of Virginia. As such, the Act exceeds the powers vested in Congress by the Fifteenth Amendment and unconstitutionally deprives the Commonwealth of Virginia of the right to prescribe racially nondiscriminatory qualifications for exercise of the elective franchise, which right is secured to the Commonwealth by the provisions of Article I, Section 2, and the Tenth and Seventeenth Amendments of the Constitution of the United States.

SUMMARY OF ARGUMENT

In essence, the Voting Rights Act of 1965 provides that no person shall be denied the right to vote in any election (Federal, State or local) because of his failure to comply

with any voter qualification test established by State law, in any State (1) which maintained a voter qualification test on November 1, 1964, and (2) in which less than 50 per centum of the resident persons of voting age were registered on November 1, 1964, *or* in which less than 50 per centum of the resident persons of voting age voted in the presidential election of November, 1964. In effect, the Voting Rights Act of 1965 abolishes any voter qualification test (including racially nondiscriminatory tests) in certain States *only*, i.e., those States falling within the ambit of one or the other of the two "50 per centum" formulae mentioned above.

The only provision of the Constitution of the United States upon which its advocates attempt to justify enactment of the legislation in question is the Fifteenth Amendment. In its entirety, that Amendment prescribes:

> "Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> "Section 2. The Congress shall have power to enforce this article by appropriate legislation."

The Commonwealth of Virginia submits that the Voting Rights Act of 1965 is constitutionally invalid because (1) in its direct operation and effect under the "50 per centum" formulae, the bill arbitrarily and unjustifiably includes within its terms States which are demonstrably free of any racial discrimination in the establishment or administration of their electoral processes and (2) in its direct operation and effect, the bill infringes the constitutional power of the individual States of the Union to impose such racially nondiscriminatory qualifications upon the exercise of the right

to vote as each State may select. In our brief we shall discuss these two fundamental objections to the challenged legislation *seriatim*.

It is well settled that Congress must have a rational basis for the findings upon which its legislation is predicated. However, no attempt to establish a valid factual premise for Congressional action with respect to voter discrimination in Virginia was made, other than to single out the completely unrelated circumstances that (1) Virginia maintained a voter qualification test on November 1, 1964, and (2) less than 50 per centum of the persons of voting age residing in Virginia *voted* in the presidential election of November, 1964. That more than 50 per centum of the resident persons of voting age in Virginia were *registered* on November 1, 1964, is incontrovertible, and the absence of any racial discrimination in Virginia with respect to the right to vote is established by other relevant evidence.

The power of Congress to enforce the guarantee of the Fifteenth Amendment is specifically limited to the enactment of "appropriate" legislation for this purpose; yet it is manifest that the "50 per centum" formulae which activate the legislation in question operate to include within the ambit of the Act the Commonwealth of Virginia, in which State no racially motivated voter discrimination exists. Clearly, Congress may not—under the guise of enforcing the Fifteenth Amendment prohibition against denial of the right to vote on account of race or color—enact legislation which suspends the electoral laws of a State in which racial discrimination in the exercise of the right to vote is known by Congress, as a matter of public record, to be nonexistent. Legislation having such an effect is clearly without reasonable classification or rational justification, amounts to no

more than a mere arbitrary fiat and cannot constitute "appropriate" legislation under the Fifteenth Amendment.

Consideration of the second stated objection to the constitutionality of the Act begins with the premise that the right to prescribe the qualification of electors is one constitutionally vested exclusively within the province of the individual States, subject only to the limitations contained in the Federal Constitution forbidding qualifications based upon race (Fifteenth Amendment), sex (Nineteenth Amendment) and the payment of a poll tax in Federal elections (Twenty-Fourth Amendment). Thus, Article I, Section 2, of the Constitution of the United States and the Seventeenth Amendment provide that electors for the House of Representatives and Senate, respectively, shall have the qualifications requisite for electors of the most numerous branch of each State legislature. Under these provisions, the qualifications of electors in Congressional elections must be those qualifications established by each State for electors of the most numerous branch of the State legislature. Moreover, this Court has repeatedly declared that a State is free to conduct its elections and limit its electorate as it may deem wise, except as its actions may be affected by the prohibitions of the Federal Constitution, and that the power of Congress to legislate at all the subject of racial discrimination in voting rests upon the Fifteenth Amendment and extends only to the prevention by appropriate legislation of the discrimination forbidden by that Amendment. The legislative history of the framing, adoption and ratification of the Fifteenth Amendment establishes beyond cavil the unassailable validity of the views so often and so consistently expressed by this Court on this subject.

In this connection, Virginia does not make the broad

(indeed, too broad) assertion that each State has the power to prescribe *any* voting qualifications it may see fit. It is the power to prescribe *racially nondiscriminatory* qualifications that each State constitutionally possesses, and when a State establishes such nondiscriminatory qualifications, it exercises a constitutionally protected power with which no branch of the Federal government may permissively interfere. When a State establishes such nondiscriminatory voting qualifications, it exercises a power wholly within the domain of the State and is insulated not only from Federal *judicial* review but from Federal *legislative* interference. It avails nothing for advocates of the constitutionality of the Voting Rights Act of 1965 to suggest that such insulation is not available when State power is used as an instrument for circumventing a federally protected right, for when a State's voting standards are, in fact, nondiscriminatory, they cannot be an instrument for such purpose nor come within the reach of Congressional power. Congress cannot substitute its own voting standards for the nondiscriminatory voting qualifications prescribed by a State without infringing the constitutionally established and judicially protected power of the States in this field.

ARGUMENT

I.

The Voting Rights Act of 1965 As Applied To Virginia And Other States Similarly Situated Violates The Fifth and Fifteenth Amendments To The Constitution of The United States In That The Classification Established Therein Is Unreasonable And Irrational.

As already noted, Section 4 of the Voting Rights Act of 1965 provides that no person shall be denied the right to vote in any federal, state or local election because of his failure to comply with any voter qualification test estab-

lished by state law, in any State or political subdivision thereof (1) which maintained a voter qualification test on November 1, 1964, as determined by the Attorney General of the United States, and (2) in which less than fifty per centum of the persons of voting age were registered on November 1, 1964, *or* in which less than fifty per centum of the persons of voting age voted in the presidential election of November, 1964.

The Attorney General of the United States has determined that the Commonwealth of Virginia has a "test or device" as that phrase is defined in the Act even though there is no "literacy" test as such. Under the Constitution and election laws of Virginia prospective voters are required to fill out a simple form in their own handwriting. Section 20, Constitution of Virginia and Sections 24-68, 24-69 and 24-71 of the Code of Virginia.

On November 1, 1964, more than fifty per centum of the persons of voting age residing in Virginia were registered, but the Director of the Census determined that fifty per centum of such persons did not vote in the presidential election of November, 1964. Thus, the provisions of the Voting Rights Act of 1965 became applicable in Virginia.

The registration procedure for all elections, federal, state and local, has been abolished in the Commonwealth of Virginia for the sole reason that fifty per centum of the qualified voters of the State exercised their right not to vote in the presidential election held on November 1, 1964.

(A) There Is No Rationality Of Connection Between The Facts Proved And The Ultimate Fact Assumed In The Act.

As the title indicates, the purpose of the Voting Rights Act is to enforce the provisions of the Fifteenth Amendment. In its entirety, this amendment prescribes:

"Section 1.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

"Section 2.

The Congress shall have power to enforce this article by appropriate legislation."

For the purposes of this brief, the Commonwealth of Virginia is not concerned with the fifty per centum formula of registered voters since more than fifty per centum of the resident persons of voting age were registered in the State on November 1, 1964.

The Commonwealth of Virginia first contends that the classification or triggering provision of the Act, namely, voter qualification tests are abolished in all states wherein fifty per centum of the resident persons of voting age failed to exercise their right to vote in the 1964 presidential elections, is unconstitutional on its face since there is no rational basis for the findings upon which it is predicated.

The constitutionality of the Act must "depend upon the rationality of the connection 'between the fact proved and the ultimate fact assumed'." *United States* v. *Gainey*, 380 U.S. 63, 13 L. ed. (2d) 658, at p. 662 (1965) and *Tot* v. *United States*, 319 U.S. 463 at p. 466, 87 L. ed. 1519 at p. 1524 (1943). See also, *United States* v. *Romano*, No. 2, October Term, 1965, decided November 22, 1965.

The facts proved are that in Virginia, in South Carolina, and in certain other states, including Alaska, "literacy" tests exist and fifty per centum of the resident persons of voting age of those states did not vote in the presidential election held in November, 1964. From these proved facts it is presumed that the Negro citizens of the states in ques-

tion have been denied their right to vote contrary to the guarantee of the Fifteenth Amendment. The Congress thereupon abolishes voter qualification tests in the states falling within the ambit of the aforesaid fifty per centum classification.

There may or may not be a sufficient rational connection between "literacy" tests and low registration to constitutionally presume a violation of the Fifteenth Amendment but, there is no valid rational connection between "literacy" tests, light voting, and discrimination.

By the passage of the triggering provisions of the Voting Rights Act, the Congress has declared that "literacy" tests and low registration result in discrimination. However, it has also found that light voting does not result in discrimination unless it is coupled with a "literacy" test. The following table,[1] indicating voting experience of the presidential election held in November, 1964, shows the fallacy of this presumed discrimination:

State	*Negro Population*	*% of Negro Population*	*Literacy Test*	*% of Both Races Voting*
Georgia	1,122,596	28	Yes	43
Louisiana	1,039,207	31	Yes	47
Texas	1,187,125	12	No	44

The Act presumes that there is no discrimination in Texas since there is no "literacy" test even though only forty-four per centum of the voting age population voted. Yet, in Louisiana wherein forty-seven per centum voted, the "literacy" test is abolished on the ground that its existence violates the Fifteenth Amendment.

The percentage of voting age persons in Arkansas who cast votes in the 1964 presidential election was less than fifty, but no discrimination is found to exist in that state.

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[1] Source: Bureau of Census.

The evidence produced at the hearings before congressional committees, upon which the statutory presumption found in the Voting Rights Act are presumed to be based, indicated that discrimination was effected by the use of tests or devices in some five states, excluding Virginia, covered by the Act. No evidence was produced which would indicate that persons who were properly registered with or without voter qualification tests were discriminated against when they voted or attempted to vote.

In *Tot, supra,* which appears to be the leading case on the question of statutory presumptions, this Court stated the rule of rational connection to be as follows:

> "* * * Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.* * *" (319 U.S. at pp. 467-68).

Where, then, is the rational connection between "literacy" tests, voting after being properly registered and discrimination, which is required before this presumption of discrimination may be found valid? The Commonwealth of Virginia submits that there is none.

A "literacy" test and a light vote, as previously illustrated, do not necessarily go together. Light votes occur in the absence of "literacy" tests. Experience proves that apathy is the cause of a light vote. After registration, "literacy" tests, of course, cannot be the cause of light votes and, to repeat, there is no evidence that Negroes have been discriminated against when they exercise their right at the polls.

Under the rule of rational connection, a fact must have

more than mere relevance toward proving the existence of the ultimate fact presumed before the statutory presumption can be upheld. Here, the fact of a "literacy" test coupled with the fact of light voting is not even relevant in attempting to prove the existence of discrimination.

To paraphrase Justice Black in his dissenting opinion in *United States* v. *Gainey, supra*, 380 U.S. 63, 13 L. ed. (2d) 658 at p. 667:

> "When matters of trifling moment are involved, presumptions may be more freely accepted, but when consequences of vital importance to * [states] and to the administration of * [their election laws] are at stake, a more careful scrutiny is necessary."

The statutory presumption of discrimination based on the fact of a "literacy" test coupled with a light vote in certain states found in the Voting Rights Act violates the rational connection rule and is invalid.

(B) States Which Are Free of Any Racial Discrimination In The Administration of Their Electoral Processes Are Arbitrarily Included Within The Terms of The Act.

An act, valid on its face, may be assailed by proof of facts demonstrating that the act as applied to a particular class is without support in reason. *United States* v. *Carolene Products Co.*, 304 U.S. 144 (1938).

The hearings before the Committee on the Judiciary of the United States Senate (1st Ses., 89th Cong.) on the Voting Rights Bill (S. 1564) do not, in fact, reveal the rationale of the classification found in the Act. Beginning on page 1447 of Part 2 of the report there is found an explanation of tables supposedly demonstrating the presump-

tion of voting discrimination where the use of tests or devices coincides with low voter participation.

1. The Department of Justice has uncovered evidence substantiated by court findings that in several states wherein the Act is applicable there has been a systematic effort to use "literacy" tests to disfranchise Negroes. (Report, p. 1450). *No such evidence has been found in Virginia.*

2. The registration data reveals a similar pattern in six of the seven states covered by the Act: a high percentage of white registration, a low percentage of non-white registration, a low voter turn out and the use of "literacy" tests. (Report, p. 1454). *Virginia does not have a high percentage of white registration and, by comparison, has a high percentage of non-white registration.*

This registration data, Table B-1, is found on p. 1472 of the said Senate report and is as follows:

State	White Voting Age Population 1964	White Registration	%	Non-White Voting Age Population 1964	Non-White Registration	%
Alabama	1,413,270	935,695	66.2	501,730	92,737	18.5
Alaska	112,470			25,530		
Georgia	1,966,456	1,124,415	57.2	669,544	167,663	25.0
Louisiana	1,353,495	1,037,184	76.6	539,505	164,601	30.5
Mississippi	794,277	525,000	66.1	448,723	28,500	6.4
South Carolina	975,660	677,914	69.5	404,340	138,544	34.3
Virginia	2,060,751	1,133,702	55.0	480,249	177,321	36.9*

3. It is alleged that similarity exists among the states, excluding Alaska, caught under the Act's classification because all of them *within the past ten years* have had a general public policy racial segregation evidenced by statutes in force in the areas of travel, recreation, schools and hospital facilities. (Report, p. 1454). *As to Virginia, such*

allegations are utterly ridiculous. The Commonwealth of Virginia operates integrated schools, integrated hospitals and integrated recreational facilities. Furthermore, intrastate travel as well as interstate travel is integrated.

The Attorney General's attempt to establish a "valid factual premise" for Congressional action with respect to voter discrimination in Virginia is also completely refuted by the findings of the United States Civil Rights Commission.

In its 1961 Report on Voting, the Commission declared:

> "The absence of complaints to the Commission, actions by the Department of Justice, private litigation, or other indications of discrimination, have led the Commission to conclude that, with the possible exception of a deterrent effect of the poll tax—which does not appear generally to be discriminatory upon the basis of race or color—Negroes now appear to encounter no significant racially motivated impediments to voting in 4 of the 12 Southern States; Arkansas, Oklahoma, Texas, and Virginia." (Volume 1, p. 22).
>
> * * *
>
> "In three States—Louisiana (where there is substantial discrimination), Florida (where there is some), and Virginia (where there appears to be none) —official statistics are compiled on the State level by county and by race." (Volume 1, p. 102).

In view of the *facts*, it is unarguably apparent that no racial discrimination exists in Virginia with respect to the right to vote. This circumstance completely undermines the indispensable factual foundation upon which the Voting Rights Act is based. The power of Congress to enforce the guarantee of the Fifteenth Amendment is specifically limited to the enactment of "appropriate" legislation for this pur-

pose; yet it is manifest that the "light voting" formula which activates the Act operates to include within its ambit States in which no racially motivated voter discrimination exists. Clearly, Congress may not—under the guise of enforcing the Fifteenth Amendment prohibition against denial of the right to vote on account of race or color—enact legislation which would suspend the electoral laws of a State in which racial discrimination in the exercise of the right to vote is known by Congress, as a matter of public record, to be nonexistent.

This Court, in *United States* v. *Carolene Products Co., supra,* said:

> "* * * the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.* * *" (304 U.S., at p. 153).

To repeat, the fact of voting discrimination does not exist in Virginia. Accordingly, the Act, when applied to Virginia, is clearly without a reasonable classification and amounts to no more than a mere arbitrary fiat which cannot meet the requirements of the Fifth Amendment or constitute "appropriate" legislation under the Fifteenth.

II.

The Voting Rights Act Of 1965 Exceeds The Authority Conferred Upon Congress By The Fifteenth Amendment And Infringes Powers Reserved To The States By Article I, Section 2, And The Tenth and Seventeenth Amendments Of The Constitution Of The United States.

As previously noted, the Voting Rights Act of 1965, in its direct operation and effect, completely abolishes the use

of any voter qualification test prescribed by State law (including racially nondiscriminatory tests) in those States falling within the scope of its activating provisions. In Argument I of this brief, the Commonwealth of Virginia has taken the position that these activating provisions are arbitrary, irrational and invalid *per se*, and that they are demonstrably so when viewed in light of the specific circumstances relating to Virginia. The argument there made would be equally applicable regardless of the nature of the substantive provisions of the Act purporting to provide a remedy for alleged violations of the guarantee of the Fifteenth Amendment.

In the present segment of our brief, counsel for the Commonwealth assert that the substantive provisions of the Act exceed the authority of Congress under the Fifteenth Amendment and infringe the power reserved to the States to prescribe racially nondiscriminatory qualifications for exercise of the elective franchise—specifically the power to impose literacy requirements, applicable to all citizens alike, as a precondition of the right to vote. This assertion, in turn, would be equally applicable regardless of the validity or invalidity of the activating provisions of the Act, *i.e.*, even if the challenged legislation applied throughout the length and breadth of the United States.

On this aspect of the instant case, the Commonwealth's position is fundamentally posited upon the premise that the right to prescribe the qualification of electors is one constitutionally vested exclusively within the province of the individual States, subject only to the limitations contained in the Federal Constitution forbidding qualifications based upon race (Fifteenth Amendment), sex (Nineteenth Amendment) and the payment of a poll tax in Federal elections (Twenty-fourth Amendment).

Thus, Article I, Section 2,[1] of the Constitution of the United States and the Seventeenth Amendment[2] provide that electors for the House of Representatives and Senate, respectively, shall have the qualifications requisite for electors of the most numerous branch of each State legislature, while the Tenth Amendment[3] reserves to the States all powers not conferred upon the Federal government.

When one remembers—as this Court pointed out in *United States* v. *Cruikshank*, 92 U. S. 542, 551—that:

> " 'The government of the United States is one of delegated powers alone, its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the Constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be granted or secured are left under the protection of the States.' "

it necessarily follows that Congress has no power to suspend the racially nondiscriminatory voting qualifications of any State, unless that power is conferred upon Congress by the Fifteenth Amendment. That such authority is conferred upon Congress by the Fifteenth Amendment we emphatically deny.

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[1] The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

[2] The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

[3] The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

A. Legislative History Of The Fifteenth Amendment

An appeal to history is in order here. Such an appeal would be appropriate in any litigation in which this Court was called upon to test the power of Congress to enforce any of the Civil War Amendments. It is especially appropriate in the instant case when so vast and revolutionary a power is asserted by Congress as that contained in the Voting Rights Act of 1965, with no suggestion of constitutional warrant for such action other than the forty-six words which comprise the Fifteenth Amendment in its entirety.

Of course, no lengthy citation of decisional authority to support the propriety of such an appeal is required. On numerous occasions this Court has not only sanctioned such an approach to the consideration of delicate and important constitutional questions, but has confirmed the indispensability of such research to the proper resolution of grave constitutional issues. Clear, succinct and irrefutable support for such a resort to history is readily available in the decisions of this Court in *Adamson* v. *California,* 332 U. S. 46; *Ullmann* v. *United States,* 350 U. S. 422; and *Bell* v. *Maryland,* 378 U. S. 226.

In the *Adamson* case, Mr. Justice Black pointed out that (332 U. S. at 72):

> "In construing other constitutional provisions, this Court has almost uniformly followed the precept of Ex parte Bain, 121 U. S. 1, 12, 30 L ed 849, 853, 7 S Ct 781, that 'It is never to be forgotten that in the construction of the language of the Constitution . . . as indeed in all other instances where construction becomes necessary, *we are to place ourselves as nearly as possible in the condition of the men who framed that instrument.*'" (Italics supplied)

Moreover, in the *Ullmann* case, Mr. Justice Frankfurter —speaking for the Court—declared (350 U. S. at 428):

> *"Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process."* (Italics supplied).

Finally, in the recent case of *Bell* v. *Maryland, supra,* Mr. Justice Goldberg approached the consideration of an analogous situation with the following admonition (378 U. S. at 288-289):

> "Of course, our constitutional duty is 'to construe, not to rewrite or amend, the Constitution.' Post, page 865 (dissenting opinion of Mr. Justice Black). Our sworn duty to construe the Constitution *requires,* however, *that we read it to effectuate the intent and purposes of the Framers. We must, therefore, consider the history and circumstances indicating what the Civil War Amendments were in fact designed to achieve."* (Italics supplied).

In the case at bar, the Commonwealth of Virginia has undertaken to document the history of the framing and adoption of the Fifteenth Amendment, so far as that history relates to the central issue now under discussion. The relevant data available from the records of the Fortieth and Forty-First Congress on this point are enlightening and, we submit, determinative in favor of the position taken by the Commonwealth. So copious has the available material proved to be that the Commonwealth has collected it in an appendix to this brief entitled "The Legislative History Of The Framing And Adoption Of The Fifteenth Amendment With Respect To The Power Of The States To Prescribe Qualifications For Exercise Of The Franchise, With Special Reference To The Establishment By The States Of Literacy

Requirements As A Pre-condition Of The Right To Vote." Counsel for the Commonwealth believe that it would be inappropriate to burden the body of this brief with a synopsis of the above-mentioned document; indeed, we seriously question whether such a synopsis would be permissible in view of the over-riding importance of this litigation. We respectfully invite the Court's attention to the study contained in this appendix, for on the basis of it the Commonwealth makes the following unqualified assertions:

(1) It was clearly understood and repeatedly acknowledged by the Framers of the Fifteenth Amendment—not only those in favor of the amendment in the form in which it was adopted, but those who favored a broader amendment and those opposed to any amendment at all—that:

(a) The only limitation imposed by the Fifteenth Amendment upon the States was that prohibiting the States from conditioning the right to vote on race, color or previous condition of servitude; and

(b) The power of the States to regulate the right of suffrage upon any other grounds applicable to all citizens alike—particularly upon the grounds of property and educational qualifications—remained with the States unfettered by the amendment; and such qualifications, regardless of their impact upon any particular class of citizens, might be established by each State without violating either the letter or the spirit of the Fifteenth Amendment.

(2) The validity of the above-stated propositions is so clearly and incontrovertibly established by the

legislative history of the framing and adoption of the Fifteenth Amendment that no impartial mind—whether of litigant, lawyer or jurist—could either dissent from these propositions or fabricate from the relevant historical material any argument to the contrary.

B. Judicial Decisions.

Thoroughly consistent with the propositions irresistibly derived from an analysis of the legislative history of the Fifteenth Amendment has been an uninterrupted line of decisions of this Court. These decisions, rendered in cases considered since the adoption of the Fifteenth Amendment, dispel in conclusive fashion any doubt concerning the validity of the fundamental position of the Commonwealth of Virginia that each State is free to limit its electorate as it may deem wise, except as its actions may be affected by the prohibitions of the Federal Constitution, and that the power of Congress to legislate at all upon the subject of racial discrimination in voting rests upon the Fifteenth Amendment and extends only to the prevention by appropriate legislation of the specific discrimination forbidden by that Amendment.

Minor v. *Happersett,* 88 U. S. (21 Wall.) 162 (1875) provides an appropriate point of departure for demonstrating the ancient lineage and current vitality of the law supporting this position. The ultimate question presented in that case was whether or not a provision of the Constitution of Missouri which excluded females from the right of suffrage was violative of the Fourteenth Amendment to the Constitution of the United States. Resolution of this question entailed consideration of the subordinate inquiry of whether or not the right of suffrage was one emanating

from the United States Constitution. Holding that the Constitution did "not confer the right of suffrage upon anyone," this Court declared (21 Wall., at 177-178):

> "Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be."

United States v. *Reese,* 92 U. S. 214 (1876) involved consideration of the validity of §§ 3 and 4 of the Enforcement Act of 1870 (16 Stat. 140) under which indictments had been laid against certain inspectors of a municipal election in Kentucky for refusing to receive and count the vote of a Negro citizen of the United States. Invalidating the provisions of law there in question, this Court stated (92 U. S. at 217-218, 220):

> "The Fifteenth Amendment does not confer the right of suffrage upon anyone. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another, on account of race, color, or previous condition of servitude. . . . If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be.
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> "This leads us to inquire whether the Act now under consideration is 'appropriate legislation' for that

purpose. *The power of Congress to legislate at all upon the subject of voting at state elections rests upon this Amendment.*

* * *

"In view of all these facts, we feel compelled to say that, in our opinion, the language of the 3d and 4th sections *does not confine their operation to unlawful discrimination on account of race, etc.*

* * *

"Within its legitimate sphere, Congress is supreme and beyond the control of the courts; but if *it steps outside of its constitutional limitation and attempts that which is beyond its reach, the courts* are authorized to, and when called upon in due course of legal proceedings *must, annul its encroachments upon the reserved power of the States and the people.*" (Italics supplied).

Referring to the *Reese* case, *supra,* in its subsequent decision in *United States* v. *Harris,* 106 U. S. 629 (1882), this Court pointed out (106 U. S. at 637):

"The attempt was made by the counsel for the United States to sustain the law as warranted by the Fifteenth Amendment to the Constitution of the United States. But this court held it not to be appropriate legislation under that amendment. *The ground of the decision was that the sections referred to were broad enough not only to punish those who hindered and delayed the enfranchised colored citizen from voting, on account of his race, color, or previous condition of servitude, but also those who hindred or delayed the free white citizen. . . .*" (Italics supplied).

In *Pope* v. *Williams,* 193 U. S. 621 (1904), this Court sustained the validity of a voting registration statute of the State of Maryland and during the course of its opinion observed (193 U. S. at 632, 633-634):

"The privilege to vote in any state is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. *Minor* v. *Happersett*, 21 Wall. 162, 22 L. ed. 627. It may not be refused on account of race, color, or previous condition of servitude, but it does not follow from mere citizenship of the United States. *In other words, the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution.*

* * *

"The right of a state to legislate upon the subject of the elective franchise as to it may seem good, subject to the conditions already stated, being, as we believe, unassailable, we think it plain that the statute in question violates no right protected by the Federal Constitution.

"The reasons which may have impelled the state legislature to enact the statute in question were matters entirely for its consideration, *and this court has no concern with them.*" (Italics supplied).

Thereafter, commenting upon the validity of an Oklahoma literacy test statute in *Guinn* v. *United States*, 238 U. S. 347 (1915), this Court asserted (238 U. S. at 362, 366):

"Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage *which has belonged to those governments from the beginning, and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support, and both the authority*

of the nation and the state would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the state, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals.

* * *

"No time need be spent on the question of the validity of the literacy test, considered alone, since, as we have seen, *its establishment was but the exercise by the state of a lawful power vested in it, not subject to our supervision, and, indeed, its validity is admitted.*" (Italics supplied).

Subsequently, in *Breedlove* v. *Suttles*, 302 U. S. 277 (1937), this Court sustained the validity of a poll tax requirement of the State of Georgia in the following language (302 U. S. at 283):

"To make payment of poll taxes a prerequisite of voting is not to deny any privilege or immunity protected by the Fourteenth Amendment. *Privilege of voting is not derived from the United States, but is conferred by the State and,* save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, *the State may condition suffrage as it deems appropriate.*" (Italics supplied).

Recently, this Court reaffirmed the validity of State prescribed literacy tests in *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45 (1959). Validating a statute of the State of North Carolina imposing such a test, the Court stated (360 U. S. at 50-51):

"The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised. . . . So while the

> right of suffrage is established and guaranteed by the Constitution . . . *it is subject to the imposition of state standards which are not discriminatory* and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. . . . While § 2 of the Fourteenth Amendment, which provides for apportionment of Representatives among the States according to their respective numbers counting the whole number of persons in each State (except Indians not taxed), speaks of 'the right to vote,' *the right protected 'refers to the right to vote as established by the laws and constitution of the State.'*" (Italics supplied).

Finally, during this very year, in *Carrington* v. *Rash*, 380 U. S. 89 (1965), this Court confirmed (380 U. S. at 91):

> *"There can be no doubt either of the historic function of the States to establish, on a non-discriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise.* Indeed, the States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised. . . . 'In other words, the privilege to vote in a State *is within the jurisdiction of the State itself, to be* exercised as the State may direct, and upon such terms, as to it may seem proper, provided, of course, no discrimination is made between individuals in violations of the Federal Constitution.'" (Italics supplied).

See also, *United States* v. *Cruikshank, supra; Davis* v. *Beason*, 133 U. S. 333; *Ex Parte Yarbrough*, 110 U. S. 651; *McPherson* v. *Blacker*, 146 U. S. 1; *Wiley* v. *Sinkler*, 179 U. S. 58; *Mason* v. *Missouri*, 179 U. S. 328 *James* v. *Bowman*, 190 U. S. 127.

Of course, the foregoing canvass of prior decisions of this Court does little more than rehearse the obvious and particularize the uncontroverted. So uniform has been the course of these decisions, so consistest the voice and so constant the teachings of this Court on the subject under consideration, as to compel invalidation of Section 4(e) of the Act on the very first occasion of a challenge to the constitutionality of the statute in a Federal court. This was the conclusion reached by the United States District Court for the District of Columbia in *Morgan* v. *Katzenbach*, C. A. No. 1915-65 (decided November 15, 1965). So recent is this decision and so pertinent its reasoning to the position taken by the Commonwealth of Virginia in this case as to merit extended quotation of its language in the body of this brief:

> "The question presented in this case is whether *the Congress has constitutional power to regulate by statute the qualifications of voters and to supersede the requirements prescribed by the States.* Specifically the issue is the constitutionality of Section 4(e) of the Voting Rights Act of 1965, which in effect provides that no person who has been educated in an American school in which the predominant language is other than English, shall be disqualified from voting under any literacy test. As a corollary, the ultimate problem is whether *this provision of the Act of Congress supersedes the literacy test for voters prescribed by the constitution and statutes of the State of New York*, which impose the ability to read and write English as a requirement for voting.
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> * * *
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> *"Traditionally and historically the qualifications of voters has been invariably a matter regulated by the States. This subject is one over which the Congress has no power to legislate.* Thus Article I, Section 2,

of the Constitution of the United States, provides as follows:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Article I, Section 4, provides as follows:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

It will be observed that this Section does not include the power to prescribe requisites for the right of suffrage. Power to make or alter regulations concerning 'the times, places and manner of holding elections' does not comprise authority to regulate qualifications for voters. No express or implied power is conferred by the Constitution on Congress to legislate concerning requirements for voters in the several States. The matter is within the purview of the Tenth Amendment, which reads as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The right of suffrage is not a privilege and immunity of a citizen of the United States as such, but is a right conferred by the States. In *Minor* v. *Happersett,* 21 Wall. 162, 177, Mr. Chief Justice Waite, in speaking for a unanimous bench, stated:

> For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be.

In that case it was held that the States had the power of excluding women from the right to vote. It required a Constitutional amendment to grant suffrage to women.

In *Pope* v. *Williams*, 193 U. S. 621, 632, the same theory was again enunciated:

> The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. *Minor* v. *Happersett*, 21 Wall. 162. It may not be refused on account of race, color or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, *the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.* (Emphasis supplied).

The doctrine that the right to vote is not a privilege derived from the United States, but is conferred by the State, was reiterated in *Breedlove* v. *Suttles*, 302 U. S. 277, 283, in the following manner:

> Privilege of voting is not derived from the United States, but is conferred by the State and, save

> as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, *the State may condition suffrage as it deems appropriate*. (Emphasis supplied).

In that case the Supreme Court unanimously held that the States had power to impose a poll tax as a prerequisite for voting. It required a Constitutional Amendment to eliminate the exaction of poll taxes as a condition precedent to voting in Federal elections.

Only within the past year the Supreme Court again restated the same propositions in *Carrington* v. *Rash*, 380 U. S. 89, 91, as follows:

> Texas has unquestioned power to impose reasonable residence restrictions on the availability of the ballot. *Pope* v. *Williams*, 193 U. S. 621. There can be no doubt either of the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise. Indeed, "[t]he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised." *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45, 50. Compare *United States* v. *Classic*, 313 U. S. 299; *Ex parte Yarbrough*, 110 U. S. 651. "In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution." *Pope* v. *Williams*, *supra*, at 632.
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> * * *

The case of *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45, decided in 1959, is practically on all fours with the case at bar. The State of North Caro-

line prescribed a literacy test for voters in the English language. A voter brought suit in the Federal court for a declaration that the requirement was unconstitutional. The Supreme Court unanimously upheld the validity of the test and the power of the State to impose it. In its opinion, which was written by Mr. Justice Douglas, the Court discussed the authority of the States *vis-a-vis* the power of the Congress in this field, in the following illuminating manner, p. 50:

> The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised. *Pope* v. *Williams*, 193 U. S. 621, 633; *Mason* v. *Missouri*, 179 U. S. 328, 335, absent of course the discrimination which the Constitution condemns. Article 1, § 2 of the Constitution in its provision for the election of Members of the House of Representatives and the Seventeenth Amendment in its provision for the election of Senators provide that officials will be chosen "by the People." Each provision goes on to state that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." So while the right of suffrage is established and guaranteed by the Constitution (*Ex parte Yarbrough*, 110 U. S. 651, 663-665; *Smith* v. *Allwright*, 321 U. S. 649, 661-662) it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. See *United States* v. *Classic*, 313 U. S. 299, 315. While § 2 of the Fourteenth Amendment, which provides for apportionment of Representatives among the States according to their respective numbers counting the whole number of persons in each State (except Indians not

> taxed), speaks of "the right to vote," the right protected "refers to the right to vote as established by the laws and constitution of the State." *McPherson* v. *Blacker,* 146 U. S. 1, 39.

There are indeed constitutional limitations on the power of the States to prescribe qualifications for voters. Each of these restrictions, however, has been imposed by an Amendment to the Constitution of the United States. Thus, the Fifteenth Amendment, which became effective in 1870, bars the States from denying or abridging the right of citizens of the United States to vote on account of race, color, or previous condition of servitude:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

By the Nineteenth Amendment, which took effect in 1920, the States are precluded from denying the right of suffrage to women. That Amendment reads as follows:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

The latest Constitutional Amendment in this field is the Twenty-Fourth Amendment, which prevents the States from imposing a poll tax as a condition for voting in Presidential and Congressional elections. That Amendment reads as follows:

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in

Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Thus whenever Congress took steps to prohibit the States from imposing a particular requirement or qualification for voting, no matter of what kind, it invariably did so by initiating and proposing a Constitutional Amendment, which later was ratified by the States. *So far as is known, until the passage of the Voting Rights Act of 1965, Congress never attempted to achieve this result by legislation. It is quite evident, therefore, that it was the continuous and invariable view of the Congress that it may not intrude into this field and does not have power to regulate the subject matter by legislative enactment.* If Congress had the authority to take such action by legislation, the use of the laborious process of amending the Constitution would have been an exercise in futility or at least unnecessary surplusage.

* * *

We have given due consideration to the presumption of validity which attaches to every Act of Congress. *That presumption, however, is completely overcome and destroyed by the inescapable conclusion that we have reached from the foregoing discussion* to the effect that Section 4(e) of the Voting Rights Act of 1965, *transgresses the powers granted to Congress* and, therefore, is repugnant to the Constitution and invalid." (Italics supplied).

In light of these decisions, it is manifest that for almost a century this Court has consistently and repeatedly proclaimed the power of each State under the Federal Constitution to establish racially nondiscriminatory criteria governing the exercise of the elective franchise of its citizens. The language in which this fundamental power of the indi-

vidual States has been declared, reaffirmed and protected consists of such plain English words that he who runs may read and the ingenuity of man cannot evade them. The legislative history of the framing and adoption of the Fifteenth Amendment and the decisions of this Court to this day echo without dissonance the voices of the Founding Fathers as exemplified by the writings of both Madison and Hamilton in various portions of The Federalist:

> "The first view to be taken of this part of the government, relates to the *qualifications of the electors*, and the elected.
>
> "Those of the former, are to be the same, with those of the electors of the most numerous branch of the state legislatures. The definition of the right of suffrage, is very justly regarded *as a fundamental article of republican government.* It was incumbent on the convention, therefore, to define and establish this right in the constitution. *To have left it open for the occasional regulation of the congress, would have been improper for the reason just mentioned.* . . . To have reduced the different qualifications in the different states to one uniform rule, would probably have been as dissatisfactory to some of the states, as it would have been difficult to the convention. The provision made by the convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every state; *because it is conformable to the standard already established, or which may be established by the state itself.* It will be safe to the United States; because, being fixed by the state constitutions, it is not alterable by the state governments, and it cannot be feared that the people of the states will alter this part of their constitutions, in such a manner as to abridge the rights secured to them by the federal constitution." (No. 52).
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> "*Suppose an article had been introduced into the constitution, empowering the United States to regulate*

the elections for the particular states, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the state governments? The violation of principle, in this case, would have required no comment; . . ." (No. 59).

* * *

"The truth is, that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect, or be elected. *But this forms no part of the power to be conferred upon the national government.* Its authority would be expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections. *The qualifications of the persons who may choose* or be chosen, as has been remarked upon another occasion, *are defined and fixed in the constitution; and are unalterable by the* [*National*] *legislature." (No. 60).* (Italics supplied).

Clearly, the prescription of racially nondiscriminatory qualifications upon the right to vote is the exercise of a power vested in each State by the Constitution of the United States. If this power rests with the States under the Constitution—as is unarguably true—then its exercise may not be interdicted by the Congress or any department of the Federal government, under the Fifteenth Amendment or any other provision of the Constitution. If the *constitutional* powers of the States could be thus manipulated out of existence by the *legislative* action of Congress, the guarantees of our Constitution are illusory indeed.

C. The Voting Rights Act of 1965.

Against the background of the legislative history of the Fifteenth Amendment and the judicial exposition of that amendment reviewed in Section A and Section B, respective-

ly, of this portion of our brief, counsel for the Commonwealth submit that the Voting Rights Act of 1965 manifestly exceeds the authority conferred upon Congress by the Fifteenth Amendment and clearly encroaches upon the powers reserved to the States to regulate the right of suffrage by prescribing racially nondiscriminatory qualifications as a precondition of the right to vote. In its direct operation and effect, the Act suspends the racially nondiscriminatory requirement of Section 20 of the Constitution of Virginia that every citizen of the Commonwealth who wishes to exercise the elective franchise must register to vote in his own handwriting. The ultimate result of the operation of the Act is to compel Virginia to engage in *the indiscriminate registration of illiterates* and to afford illiterates as a class, whether of the white or the colored race, the right to vote in all elections.

Within narrow compass, the Act would clearly be unconstitutional upon the authority of the *Reese* and *Harris* cases alone. As this Court stated in the latter case, the "sole object" of the Fifteenth Amendment was "to protect from denial or abridgement . . . *on account of race, color, or previous condition of servitude,* the right of citizens of the United States to vote." *United States* v. *Harris, supra,* at 637. (Emphasis supplied). At the same time the Court pointed out that it had invalidated §§ 3 and 4 of the Enforcement Act of 1870 in the *Reese* case because those provisions were so "broad" that they punished not only those "who hindered and delayed the franchised *colored* citizen from voting, on account of his race, color or previous condition of servitude, but also those who hindered or delayed the free *white* citizen." *Id.* at 637. (Emphasis supplied). Thus, to the extent that Congressional legislation predicated upon the Fifteenth Amendment has the effect of enfranchising the citizens of a State without regard to their race,

or protecting the right of citizens to vote from any discriminaion other than race, such legislation transcends the limitations of the Fifteenth Amendment. How can it possibly be intimated that legislation which has the inescapable effect of affirmatively enfranchising illiterates of the *white* race constitutes "appropriate" legislation under a constitutional provision "whose sole object" was to prevent the disenfranchisement of *colored* citizens *because of their race?* To the extent that the Act requires Virginia to register illiterates of the white race, it obviously collides with the rationale of the *Reese* and *Harris* decisions and is invalid.

In broader compass, the Act is unconstitutional to the extent that it abolishes the racially nondiscrimination literacy requirements of any State and mandates the enfranchisement of illiterates generally. No one suggests that Congress has been delegated the authority to protect citizens of the United States from discrimination in the exercise of the right to vote upon the ground of literacy. On the contrary, the right of a State to limit its electorate upon this ground has been expressly confirmed in the *Guinn* and *Lassiter* cases. In the latter case, this Court pointed out that a literacy test may be unconstitutional on its face, or that a literacy test—fair on its face—may be employed to achieve the racial discrimination condemned by the Fifteenth Amendment. However, with respect to the literacy test of North Carolina there under consideration, the Court observed (360 U. S. at 53-54):

> "The present requirement, *applicable to members of all races,* is that the prospective voter 'be able to read and write any section of the Constitution of North Carolina in the English language.' That seems to us to be one fair way of determining whether a person be literate, not a calculated scheme to lay springes for the citizen." (Italics supplied).

Just such a situation exists in the Commonwealth of Virginia. Under Virginia law, a prospective voter is required to fill out in his own handwriting a form indicating the applicant's age, date and place of birth, residence and occupation at the time of registration and for one year next preceding, whether or not he has previously voted, and if so, the State, county and precinct in which he last voted. These requirements are not only reasonable but are utterly devoid of any racial connotation whatever, and their imposition neither denies nor abridges anyone's right to vote because of race or color. Under the Constitution of the United States, Virginia has the power to impose these nondiscriminatory voter qualifications upon its citizens, and the Congress has no authority whatever to suspend them or vary these requirements in the slightest degree.

Let us attempt to clarify the position of the Commonwealth on this point and emphasize its validity by reference to an analogy with which, we venture to suggest, no one will disagree. Section 2 of the Fourteenth Amendment authorizes Congress to reduce the basis of representation of States in the House of Representatives whenever the right to vote in a State is denied or abridged except upon stated grounds. By contrast, the right of a State to equal representation in the Senate of the United States by two Senators, each of whom shall have one vote, is a right guaranteed to each State without qualification by Article V of the Constitution. If the Congress of the United States—purporting to act under the Fifteenth Amendment—should enact a law diminishing Senate representation in those States in which the right to vote has been denied or abridged upon the ground of race, would such a law be constitutional? Manifestly not, and we do not believe that anyone would have the temerity to suggest that it would be. In enacting appropriate legislation under the Fifteenth

Amendment, it simply does not lie within the power of Congress to violate other provisions of the Federal Constitution which expressly guarantee certain rights to, and confer certain powers upon, the States or other independent coordinate branches of the Federal government. *Yet the right to prescribe racially nondiscriminatory voting qualifications is one no less vested in the States by the Federal Constitution than the right to equal representation in the Senate. If the latter right of the States cannot be infringed by Congress under the Fifteenth Amendment, the former right equally cannot be.*

Other analogies readily lend themselves to the support of Virginia's position in the case at bar. The Fourteenth Amendment prohibits a State from excluding its citizens from jury service upon the ground of race or color, and Congress is empowered to enforce the guarantees of the Fourteenth Amendment by appropriate legislation. If it should be conclusively established to the satisfaction of Congress, and the world at large, that a particular State was, in fact, so discriminating, would it lie within the power of Congress to suspend the right of trial by jury in such State under the guise of enforcing the guarantees of the Fourteenth Amendment? Similarly, if it should be conclusively established to the satisfaction of Congress, and the world at large, that a State was altering the boundaries of its political subdivisions along racial lines for the purpose, and with the effect, of infringing the right of the colored citizens of such subdivisions to vote—as, indeed, it was established to the satisfaction of this Court in *Gomillion* v. *Lightfoot*, 364 U. S. 339—would it lie within the power of Congress to suspend by statute the right of that State to alter the boundaries of its political subdivisions under any circumstances? It needs no argument to demon-

strate that the powers of Congress are not so sweeping and unlimited.

With respect to the considerations which determine the propriety of Congressional action under the powers delegated to that body by the United States Constitution, the recent decision of this Court in *Aptheker* v. *Secretary of State*, 378 U. S. 500, is highly relevant to, and consistent with, the contentions made by Virginia in the instant litigation. In that case, the Court invalidated Section 6 of the Subversive Activities Control Act of 1950 which forbade members of certain Communist organizations from making application for, or using, or attempting to use a passport issued under the authority of the United States. Enunciating the principles governing judicial consideration of the exercise of Congressional power there in question, this Court declared (378 U. S. at 508, 509, 512, 514):

> "It is a familiar and basic principle, recently reaffirmed in NAACP v. Alabama, 377 US 288, 307, 12 L ed 2d 325, 338, 84 S Ct 1302, that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation *may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.*'
>
> * * *
>
> "In applying this principle the Court in NAACP v. Alabama, supra, referred to the criteria enunciated in Shelton v. Tucker, supra, 364 US at 488, 5 L ed 2d at 237:
>
> > " 'Even though the governmental purpose be legitimate and substantial, *that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.* The breadth of legislative abridgment must be viewed in the light of less

drastic means for achieving the same basic purpose.'

* * *

"At the same time the Constitution requires that the powers of government '*must be so exercised as not*, in attaining a permissible end, *unduly to infringe' a constitutionally protected freedom.*

* * *

"In determining the constitutionality of § 6, *it is also important to consider that Congress has within its power 'less drastic' means of achieving the congressional objective* of safeguarding our national security.

* * *

"In our view the foregoing considerations compel the conclusion that § 6 of the Control Act is unconstitutional on its face. The section, judged by its plain import and by the substantive evil which Congress sought to control, *sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment. . . . The section therefore is patently not a regulation 'narrowly drawn to prevent the supposed evil,'* cf. Cantwell v. Connecticut, 310 US at 307, 84 L ed at 1219, yet here, *as elsewhere*, precision must be the touchstone of legislation so affecting basic freedoms." (Italics supplied).

See also, *Griswold* v. *Connecticut*, 381 U. S. 479; *NAACP* v. *Button*, 371 U. S. 415.

Surely, no one will suggest that judicial protection of the constitutional powers of the States from unwarranted encroachment by the Federal government is a matter of less concern to this Court than the protection of the constitutional rights of citizens from such encroachment. Nor can it be contended that the criteria for testing the validity of Congressional action which affects State powers are less severe or apply less stringently than those which determine the propriety of Congressional action touching personal liberties. Thus, a constitutional purpose to enforce the pro-

visions of the Fifteenth Amendment may not be achieved by enactments "which sweep unnecessarily broadly and thereby invade" an area constitutionally reserved exclusively for State regulation; nor may such Congressional purpose "be pursued by means that broadly stifle fundamental" State powers "when the end can be more narrowly achieved." *Aptheker* v. *Secretary of State, supra,* at 508. Moreover, in determining the constitutionality of Congressional action to enforce the Fifteenth Amendment, it is important to consider whether "Congress has within its power 'less drastic' means of achieving" its objective. *Id.* at 512.

Tested in the light of these principles, the Voting Rights Act of 1965 falls to the ground on all counts. Congressional legislation which openly and admittedly suspends the power of the States to prescribe racially nondiscriminatory voting qualifications obviously sweeps "too widely and too indiscriminantly" across the powers constitutionally reserved to the States. *Id.* at 514. Moreover, that Congress has within its power "less drastic means" of achieving its purpose is too apparent to be questioned. In the *Aptheker* case, this Court made reference to a "Message from the President—Issuance of Passports" as indicating the view of the Executive Branch of the government that our national security could be protected by means "more discriminately tailored" to the constitutional liberties of individuals. *Id.* at 514. One has only to read the Minority Report of the Committee on the Judiciary accompanying H. R. 6400 (which bill became, in substance, the Voting Rights Act of 1965) to see clearly one of the available means for enforcing the Fifteenth Amendment which is "more discriminately tailored" to the constitutionally protected powers of the States with respect to the establishment of racially nondiscriminatory voting qualifications.

Enactment of legislation which would effectively enforce the guarantees of the Fifteenth Amendment without im-

permissibly trespassing upon the reserved powers of the States involves no exercise in legislative legerdemain. In its simplest form, such a statute need only provide that when a specified number of citizens allege in a Federal district court that they have been denied the right to register to vote because of their race or color, and that State officials have not taken prompt steps to remedy this situation, the district court shall hear the matter as expeditiously as possible. If the district court finds that the allegations of the complaint are supported by evidence, it may appoint an examiner to receive the application of the complainant—and others similarly situated—and review the acceptability of such person under qualifications upon the right to vote imposed by State law. If the court appointed examiner finds any such person qualified to vote under State law, he shall transmit the name of such person to the appropriate State official, who shall place such name upon the voting rolls, and such person shall thereafter be permitted to vote. Additional provisions for review of the Federal examiner's decision could be made, with the right to vote protected during the pendency of review. A statute enacted within this framework would effectively enforce the provisions of the Fifteenth Amendment and still leave intact the constitutional power of the States to prescribe voting qualifications.

Surely, in light of these and other options available to it, Congress possessed less drastic means of achieving its purpose in this instance. Equally manifest is it that—in an area where "precision must be the touchstone" of legislation affecting so fundamental a power of the States—the Act in question is not a regulation "narrowly drawn to prevent the supposed evil. . . ." *Id.* at 514. On the contrary, the Act uproots the most fundamental power of the States in this field and, in effect, repeals the relevant provisions of Article 1, Section 2, and the Tenth and Seventeenth Amendments to the Constitution of the United States.

CONCLUSION

On March 29, 1965, the Attorney General of Virginia testified before Subcommittee No. 5 of the Committee on the Judiciary of the House of Representatives of the United States in opposition to H. R. 6400 which, in substance, became the Voting Rights Act of 1965. On that occasion, he began his testimony with the statement that the proposed bill was:

> ". . . among the most dangerous pieces of legislation ever offered in the Congress of the United States. I make this statement advisedly, for I earnestly believe it goes further than any step yet attempted to erode the basic concepts of constitutional government in which the individual States are acknowledged to be sovereign. The legislation is not only patently unconstitutional, but it is shockingly discriminatory."

Consistent with this statement, counsel for the Commonwealth of Virginia now submit that upon mature consideration and analysis it will be seen that the enactment of the Voting Rights Act of 1965 presents a deplorable example of Congress at its worst. Ambitious of result but reckless of means, Congress has enacted legislation which is utterly without constitutional foundation and destitute of judicial support. With respect to the definition of the right of suffrage—a subject everywhere regarded as fundamental to representative government and one over which the powers of the Nation and the States were precisely allocated by the Constitution—the Congress has now destroyed that balance of power by enacting a statute which "runs a plow-share through all the State Constitutions and overturns the most important State regulations that can be found." Appendix, p. 17. This "plow-share"—now legislative in character—is

precisely the implement which was repeatedly sought, *without success*, to be legally placed in the hands of Congress by constitutional amendment. That power which the framers of the Fifteenth Amendment and the ratifying States were unwilling to confer upon Congress is now attempted to be exercised by Congress without pretense of constitutional warrant.

Thus, the issues presented in this litigation reach far beyond and rise high above the mere validity or invalidity of Congressional action, for the legislation here under consideration involves the fundamental structure of the Union and seeks to undermine the very form of government under which we live. The importance of the maintenance of the framework of government established by the Constitution to the protection of individual liberty was recently made clear by Mr. Justice Harlan in his address dedicating the Bill of Rights Room in New York City on August 9, 1964, when he emphasized that the framers of the Constitution:

> ". . . staked their faith that liberty would prosper in the new Nation not primarily upon declarations of individual rights *but upon the kind of government the Union was to have*. And they determined that in *a government of divided powers* lay the best promise for realizing the free society it was their object to achieve." (Italics supplied).

Of course, on that occasion, Mr. Justice Harlan did not single out for consideration the right of suffrage and the division of powers between the Federal and State governments over this subject. But the power of the States to define the right of suffrage is a basic structural element of the governmental edifice erected by the Constitution and one indispensable to our federalism. Speaking of it, and of the inevitable results of any trespass upon it by the Congress,

Mr. Chief Justice White long ago declared in *Guinn* v. *United States,* 238 U. S. 347, 362, that the power was one:

> ". . . which has belonged to those governments from the beginning, and *without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support, and both the authority of the nation and the state would fall to the ground.* (Italics supplied).

Clearly, all history teaches what the decisions of this Court confirm—that the power of the States to regulate the right of suffrage and to prescribe racially nondiscriminatory qualifications for voting is original and independent, not derivative or subordinate. This power is not granted to the States by any law, but remains with the States where it has existed since the formation of the Union, and it has never been lodged anywhere else. If this power may be suspended by the Congress today under the guise of enforcing one provision of the Constitution, what other powers of the States may not also be suspended tomorrow upon a similar pretext? If the revolutionary assertion of Congressional authority embodied in the Voting Rights Act of 1965 should receive the sanction of this Court, the original landmarks of liberty in this land will have been irretrievably lost, and this Court will have placed its imprimatur upon a present day manifestation of that doctrine against which it warned a century ago in *Ex Parte Milligan,* 71 U. S. (4 Wall.) 2, 120, 121:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of

men, at all times, and under all circumstances. *No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.*" (Italics supplied).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, R. D. McIlwaine, III, an Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of counsel for the Commonwealth of Virginia, as *amicus curiae*, in the above-captioned matter, hereby certify that copies of the Brief on Behalf of the Commonwealth of Virginia, *Amicus Curiae*, have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post Office, with first class postage prepaid, this 17th day of December, 1965, pursuant to the provisions of Rule 33(1) of the Rules of the Supreme Court of the United States, as follows: Daniel R. McLeod, Esq., Attorney General of South Carolina, Wade Hampton Building, Columbia, South Carolina, and David W. Robinson, Esq. and David W. Robinson, II, Esq., Special Counsel, P. O. Box 1942, Columbia, South Carolina, counsel for plaintiff State of South Carolina; and upon Nicholas deB. Katzenbach, Esq., Attorney General of the United States, and Thurgood Marshall, Esq., Solicitor General of the United States, Department of Justice, Washington, D. C., 20530, defendant and counsel for defendant respectively.

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Assistant Attorney General

DEC 2 (
JOHN F. DAVI

APPENDIX TO BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA, AMICUS CURIAE

NO. 22, ORIGINAL

In The

Supreme Court of the United States

October Term, 1965

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

NICHOLAS DEB. KATZENBACH,
ATTORNEY GENERAL OF THE UNITED STATES,

Defendant.

The Legislative History Of The Framing And Adoption Of The Fifteenth Amendment With Respect To The Power Of The States To Prescribe Qualifications For Exercise Of The Franchise, With Special Reference To The Establishment By The States Of Literacy Requirements As A Precondition Of The Right To Vote.*

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A. The Original House Version.

When the Third Session of the Fortieth Congress met in December, 1868, the Republican majority had safely weathered the fall elections, securing the White House with Grant as the new President, and re-electing a safe majority in both branches of Congress. Proposals for amending the Constitution to secure suffrage for Negroes were widespread.[1] Moreover, proposals were submitted which would have instituted universal manhood suffrage.[2]

The 1868 Republican Party platform had declared that

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*Original research and preparation of material contained herein was prepared by Dr. Alfred Avins, Professor of Constitutional Law, Memphis State University.

"the question of suffrage in all the loyal States properly belongs to the people of those States," and the Democratic minority was not slow in objecting to any amendments based on this platform.[3]

The original draft by the Senate Judiciary Committee simply banned discrimination based on race, color, or previous condition of servitude.[4] Senator James Dixon, a Connecticut conservative, noted that under this draft "in all other respects the State is left free to prescribe is own restrictions."[5] He bore down on the Republican platform promise to leave suffrage to the states.[6] He was followed by Senator Samuel C. Pomeroy of Kansas, a Radical Republican, who proposed to change the committee draft to ban discrimination in suffrage "for any reasons not equally applicable to all citizens of the United States." Pomeroy, who had voted for the Fourteenth Amendment, noted that "If you want a condition of intelligence, of education, of any quality that applies equally to all, it can be adopted by the States under the amendment that I have proposed.[7] He was willing, in addition, to have age and residence restrictions, but urged women's suffrage as well as voting rights for Negroes.[8]

That same day, in the House of Representatives, Congressman Samuel Shellabarger, an Ohio Republican, objected to the form of the constitutional amendment submitted on behalf of the House Judiciary Committee by Congressman George S. Boutwell of Massachusetts, a Radical Republican, which was similar to the original proposition of the Senate Judiciary Committee, because the "committee propose simply to prohibit the States from making discriminations among the various classes of citizens, based upon . . . race, color, or previous condition of slavery." He urged universal manhood suffrage instead. Referring to the committee draft, he declared:

"The consideration which I say seems to me almost fatal to his plan is, that it leaves still, substantially, the great mischief unremedied which the exigencies upon us demand that we shall correct; and that is, that it leaves to the States the power to make discriminations as to who shall vote. These discriminations may be on the score of either intelligence or want of property, or any other thing than the three things enumerated in his proposition.

* * *

"... the body of this [colored] race, made ignorant and destitute by our wrong, may substantially all be now excluded from the elective franchise under a qualification of intelligence or property or any other than the three named in the pending amendment, which qualification may be prescribed in the State laws, and is not prohibited by the gentleman's amendment. ... Let it remain possible, under our amendment, to still disfranchise the body of the colored race in the late rebel States and I tell you it will be done. ..."[9]

Shellabarger added:

"And, sir, can I be mistaken when I say that under the amendment of the gentleman from Massachusetts these 'mourners for the lost cause' can disfranchise the vast, overwhelming mass of the colored people of the entire South? Sir, it is impossible that I should be mistaken. The gentleman urges upon me as a reason why he prefers his amendment to the one I offer and prefer that mine would render the constitution of his own State unconstitutional, because Massachusetts requires that a voter shall be able to read; while his plan would leave it in the power of the States to continue and enforce an exclusion from the ballot because the man could not read. This position confesses the almost fatal defect of his plan. This colored race cannot now read because we have for these centuries shut them from the light; they are poor, because we have during these

> centuries stolen their property. And now we are about to make an amendment to our organic law . . . by which we say to the oppressing race, 'You may forever in the future, as you have in the past, keep away from these people both knowledge and property, by keeping away from them the ballot.' . . ."[10]

Congressman John A. Bingham, the Radical Republican from Ohio who had drafted the First Section of the Fourteenth Amendment, concurred completely in Shellabarger's argument that the Boutwell amendment would only cover discrimination based on race, color, or previous condition of slavery, and nothing else. Bingham declared:

> "Those three terms are the only terms of limitation in it, and hence it is manifestly true that this power remaining in the States, in no other manner fettered by the proposed amendment, may be exercised to the end that an aristocracy of property may be established, an aristocracy of intellect may be established, an aristocracy of sect may be established; in short, what has been done in New Hampshire in regard to official qualifications may be done in every State in this Union in regard both to the qualifications of electors and the qualifications of officers; that is to say, the States may set up a religious test, and pronounce at once that all who are not of the Protestant faith shall be disqualified either to vote or to hold office, and add thereto a property qualification and an educational qualification.
>
> "Hence, I believe, if we are going to touch this question by amendment we ought so to amend the proposition of the gentleman from Massachusetts [Mr. Boutwell] that the amendment presented to the people for their approval will inform them that upon its adoption these abuses by States will hereafter be impossible."[11]

Congressman Benjamin F. Butler, the colorful Massa-

chusetts pro-southern Democratic lawyer who had become a Union general and Radical Republican, came to the defense of Boutwell's amendment. He noted that Shellabarger's proposal and Bingham's proposal would "take away from the State any power whatever to make any educational or other test," because "You cannot put on any educational test, for that would be abridging the equal exercise of the elective franchise."[12] Butler also contended that these proposals would outlaw any state registration law because such a law would discriminate against people who had recently moved into the neighborhood. Butler urged that the House should adopt the Judiciary Committee's draft without alteration.[13] After Congressman William A. Pile, a Missouri Republican, noted that the main thing which should be done was to enfranchise Negroes, Boutwell remarked that the debate among the Republicans "demonstrated two facts: one is, there is a very general agreement that it is desirable to submit an amendment to the Constitution, and the other is, that there is a very great difference of opinion as to the details of the amendment."[14]

After hearing another speaker on Negro suffrage, Boutwell decided to make some modifications in the Judiciary Committee recommendation. He refused to accept the Bingham or Shellabarger proposals because they would endanger state registration laws and "abolish those qualifications in some States which require the voter to pay a small capitation tax. . . ." He feared that "by arraying against this proposition all the peculiarities of the different States we put the proposition itself in danger." But he was willing to ban property or educational qualifications, as being of a more serious and objectionable character.[15]

Bingham then objected that banning "property and educational qualifications recognizes the right in every State of establishing a religious test" because "every other thing not

included in this exception may be made a test. . . ." He deplored such a "piecemeal" way of amending the Constitution, and noted that "I stand here opposed to a proposition which on its face, in the words of Marshall, necessarily implies the consent of the House and of the country, if we adopt the amendment, that religious tests may be established as a condition of the exercise of the elective franchise." When Eldridge arose to underscore this point by inquiring whether Boutwell's altered proposal would not only allow states to impose "a religious test, but every test that the mind of man can conceive that does not come under the head of property or of education," Bingham reiterated his claim, and called for an amendment which would give Congress the power to enforce "equal exercise of the elective franchise," by a negative limitation on the states.[16]

Boutwell found Bingham's proposal too broad on pragmatic grounds. He became convinced that "if we should attempt to grasp at too much we shall lose the whole." Boutwell indicated his willingness to submit to the House an addition banning literacy and property qualifications for voting, but advised that each addition to the Judiciary Committee's draft dealing only with Negroes would pyramid opposition, thereby risking the whole proposition by increasing the difficulties of ratification in the state legislatures. To this Shellabarger answered that his amendment giving each person an equal right to vote would preserve state registration laws, but Boutwell differed with him and pointed out that a recent arrival could not be barred from voting under the proposal.[17]

The parting shot came from Congressman Thomas A. Jenckes, a Rhode Island Republican lawyer. He opposed another negative limitation on the states such as that contained in the committee draft or Bingham's amendment because it "makes the condition of suffrage primarily the

subject of legislation in the Legislatures or in the conventions of the States, and then throws the residuum which is declared beyond their power into Congress for settlement." He added that this would cause confusion which he preferred to be settled by affirmatively prescribing voting qualifications.[18]

Boutwell called for a vote, after hearing these conflicting proposals, first on the amendment to ban literacy test and property qualifications. Congressman James A. Garfield, an Ohio Republican lawyer and later President of the United States, declared that "I should be sorry to see . . . a prohibition placed in the Constitution" against "an educational test for suffrage." The amendment lost by a vote of 45 to 95, and its support was insufficient even for a roll-call vote.[19]

The next day, Congressman John M. Broomall, a Radical Republican from Pennsylvania, opposed suffrage "distinction of wealth, intelligence, race, family, or sex."[20] He exhorted the House to follow the proposed amendment by a women's suffrage provision.[21] Congressman Robert C. Schenck, an Ohio Republican lawyer and former professor, also described the Massachusetts English-language literacy test to the House in the course of describing the effect of Shellabarger's amendment.[22]

In closing the debate, Boutwell told the House:

> "the distinctions and differences of opinion which have been evolved by the debate in regard to the effect of the amendment proposed by the gentleman from Ohio afford to my mind conclusive evidence that if we submit the amendment in that form to the country we shall introduce in every State confusion, discord, and contention as to what the effect of the provision will be. But the amendment reported by the Judiciary Committee is directed against those distinctions which have been brought prominently before the country, and on

> which substantially public opinion, as entertained by the Republican party, has been expressed. We are safe if we stand upon the resolution reported by the committee; and, in my judgment, we are unsafe if we accept what we ourselves confessedly are unable to understand in such a way as to come to an agreement upon it."[23]

The House then voted down Shellabarger's proposal by 126 nay to 61 yea, and voted down Bingham's amendment by 160 nay to 24 yea.[24] It then passed the committee's proposal, which was to become the Fifteenth Amendment, by 150 yea to 42 nay.[25]

B. The Original Senate Version.

Debate in the Senate was opened upon the House resolution, as modified to add the right to hold office, by Senator Orris S. Ferry, a Connecticut Republican, who denied that the proposed amendment violated the Republican Party platform pledge of 1868, and asserted that the Democratic opposition based on the pledge was "higgling about estoppels and technicalities."[26] Shortly thereafter, Senator Willard Warner, a Republican from Alabama, moved to amend the joint resolution to give adult male citizens "an equal vote at all elections." He declared:

> "We eschew in our system of government all aristocracies, whether of birth, of wealth, or of learning . . . we profess to give to each individual an equal share of political power."[27]

Warner added:

> "The *animus* of this amendment is a desire to protect and enfranchise the colored citizens of the country; yet, under it and without any violation of its letter or

spirit, nine tenths of them might be prevented from voting and holding office by the requirement on the part of the States or of the United States of an intelligence or property qualification.

". . . You fail to protect the only classes of your citizens who need protection. Knowledge is power. Wealth is power. The learned and the rich scarcely need the ballot for their protection. . . . The millionaire in his money, and the man of education in his knowledge and his brain, have each a power in government greater than a hundred ballots, a power which the Constitution neither gives nor can take away. It is the poor, unlearned man, who has nothing but the ballot, to whom it is a priceless heritage, a protection, and a shield.

* * *

"While no man puts a higher estimation on the value of intelligence in the people than I do, and while no one would do more than I would to encourage the education of the masses, I repeat that it is the disfranchisement and oppression of the poor and the ignorant which it is our duty to guard against. In protecting the poor and the unlearned you are protecting the great laboring, industrial classes of the country."[28]

Senator Oliver P. Morton, an Indiana Republican, stated that although he would vote for the House draft, he was not satisfied with it because "this language admits or recognizes that the whole power over the question of suffrage is vested in the several States except as it shall be limited by this amendment. It tacitly concedes that the States may disfranchise the colored people or any other class of people for other reasons save and except those mentioned in the amendment." Morton mentioned various differing state qualifications, such as the Massachusetts literacy test, the Rhode Island property qualification, sundry residence requirements, and the special New York provision only allow-

ing Negroes owning $250 worth of property to vote. Morton advocated establishment by constitutional amendment of uniform standards for voting, warning:

> "This amendment leaves the whole power in the States just as it exists now, except that colored men shall not be disfranchised for the three reasons of race, color, or previous condition of slavery. They may be disfranchised for want of education or for want of intelligence. The States of Louisiana and Georgia may establish regulations upon the subject of suffrage that will cut out forty-nine out of every fifty colored men in those States from voting, and what may be done in one of these States may perhaps be done in others. They may, perhaps, require property or educational tests, and that would cut off the great majority of the colored men from voting in those States, and thus this amendment would be practically defeated in all those States where the great body of the colored people live. Sir, if the power should pass into the hands of the rebel population of these States—perhaps I should . . . rather call it the Conservative or Democratic population—if they could not debar the colored people of the right of suffrage in any other way they would do it by an educational or a property qualification."[29]

Moreover, Morton warned that the southern states could "dodge" the entire amendment by disenfranchising Negroes on the ground that "they are deficient in natural intelligence." But if the Senate would not go this far, Morton said that he preferred a proposal by Senator Jacob M. Howard, a Michigan Republican, giving citizens of African descent the same right to vote and hold office as other citizens, because at least that would be clearer, although "it still leaves the States the power of establishing an educational or proporty test by which they would cut off the great mass of colored men."[30]

Senator George H. Williams, a Republican lawyer from Oregon, proposed to give Congress complete control over voting qualifications.[31] He, too, warned that "any other conceivable ground [of disqualification for voting] would not contravene that amendment," and that the southern states would find it easy to evade. Williams added:

> "It is an old adage that 'where there is a will there is a way,' and I undertake to say that if this amendment which is proposed by the committee is adopted the white people of any State in this Union will possess the constitutional power to disfranchise colored citizens; and they will only have to put the act of disfranchisement upon some other ground than that of color or race."[32]

Williams not only wanted to protect Negroes, but also one white group against another. However, he urged his amendment also for the purpose of excluding the Chinese from the ballot, whose "political filth and moral pollution . . . are flowing with a fearfully increasing tide into our country from the shores of Asia."[33]

Senator Charles Sumner, the ultra-Radical Massachusetts Republican, followed next with a long declamation against racial restrictions on voting. He declared that "Nothing can be a 'qualification' [for voting] which is not in its nature attainable, as residence, property, education or character, each of which is within the possible reach of well-directed effort," and therefore color could not be a qualification for voting.[34] However, Senator George Vickers, a Maryland Democrat, in opposing any amendment, twitted Sumner about the Massachusetts literacy test.[35] Likewise, Senator James A. Bayard, a Delaware Democrat and an opponent of any amendment, noted that in a few States it was "made a prerequisite to the exercise

of the franchise that the voter shall be able to read the Constitution of the United States or of the State or some other paper, and to write his name." Bayard opposed this "educational franchise" for Delaware, but supported the right of a state to adopt it if the state chose to do so. Bayard pointed to various restrictions on voting, such as payment of taxes, residence, age, sex and race. He accused many of those favoring women's suffrage of being communists and socialists. He finally noted that the amendment would allow Chinese on the West Coast to vote, which inhabitants there opposed.[36] Senator Henry W. Corbett, an Oregon Republican who urged an amendment which excluded Chinese from the right to vote, also mentioned the literacy and property limitations on voting found in Massachusetts and New York.[37]

A few days later, Senator Frederick T. Frelinghuysen, a New Jersey Republican lawyer, urged the Judiciary Committee's amendment on the Senate. He declared:

> "It does not take away from the States the right to regulate. It leaves the States to declare in favor of or against female suffrage; to declare that a man shall vote when he is eighteen or when he is thirty-five; to declare that he shall not vote unless possessed of a freehold, or that he shall not vote unless he has an education and can read the Constitution. The whole question of suffrage, subject to the restriction that there shall be no discrimination on account of race, is left as it now is. . . ."[38]

Frelinghuysen opposed Williams' amendment "to take the regulation of suffrage from the States and give it to the General Government" because "I think suffrage is better where our fathers placed it. . . ."[39]

Senator Joseph S. Fowler, a Tennessee Republican law-

yer, urged universal manhood suffrage. He declared that the "proposition from the House to limit the constitutional amendment by the qualifications of race, color, or previous condition of servitude is a disgrace to the age. . . . I do not know who of the Judiciary Committee approved this piece of sublime stupidity."[40] On the other hand, Senator Jacob M. Howard, a Michigan Republican, wanted to make it even more clear that the amendment was meant exclusively for Negroes. He declared:

> "Again there arises from that peculiar form of expression, 'shall not be denied or abridged by the United States,' what, to my mind, is a very plain implication that in respect to other matters except race, color, or previous condition of servitude, the United States may, through its proper organs, if the Government shall see fit, abridge or deny to citizens of the United States in a State the right to vote or to hold office. For instance, the implication arises that for any other cause, whether it be religious belief, or a want of moral training, or defect of education, or whatever other test Congress may see fit to prescribe, the right to vote may be taken away from the citizen of the United States by act of Congress. Certainly I do not apprehend that the Committee on the Judiciary intended any such thing; but so plain to me is this implication that under such a clause Congress would have the right to deny or abridge the right of voting for some other causes than those mentioned in the article, that I certainly can never give that amendment my vote. . . ."[41]

The amendment of Senator Williams giving Congress complete control over suffrage was rejected by a vote of 38 to 6, on February 8th, 1869,[42] and that same day Senator Henry Wilson, a Massachusetts Republican and long a foe of literacy tests in his own state, offered an amendment banning discrimination in voting and office-holding based

not only on race and color, but also on nativity, property, education and creed.[43]

Shortly thereafter, Howard's amendment to confine the joint resolution to Negroes only was debated. Senator George F. Edmunds, a Vermont Republican, opposed this as not being based on any principle. But several senators supported it as hitting exactly what the Senate was against, especially three Pacific Coast Republicans who were anxious to keep the Chinese from voting.[44] When Edmunds objected to Howard's plan because it would leave the states free "to fix qualification of property, of intelligence, of religion, of landholding, of anything that may reduce a State government to an aristocracy," Williams asked him whether "the amendment reported by the committee does not leave the entire power in the hands of the States to provide any educational or property or other qualification that they see proper for voters." Edmunds replied: "Very likely it does under one construction, but it does not invite it."[45] He then went on to castigate Howard's amendment for its partiality to Negroes, concluding: "that it is little less than an outrage upon the patriotism and good sense of a country like this, made up of the descendents of all nations, to impose upon them an amendment of that kind."[46] Warner chimed in to add that "I hope the Congress of this country will not single out one race for protection . . . I think to single out one race is unworthy of the country. . . ."[47]

Senator William M. Stewart, a Republican lawyer from Nevada who was in charge of the Judiciary Committee's resolution, asked Howard whether his amendment could not be evaded by a state requiring that all voters must own $10,000 worth of real estate. Williams interjected that "They could avoid one amendment as well as another," and Howard concurred.[48] Senator Frederick A. Sawyer, a South Carolina Republican, then raised the same point, as follows:

"MR. SAWYER. . . . If his amendment were adopted, would it not be competent for any of the States lately reconstructed, should they fall into the hands of our political opponents, to make such qualifications for suffrage, without violation of the terms of this amendment, as would practically disfranchise four fifths of the citizens of African descent?

"MR. HOWARD. . . . it is to be remembered, at the same time, that whatever regulation or restriction may be established in this regard by a State, it must operate with equal severity upon the white and the black races. I call his attention further to the fact that the amendment reported by the Judiciary Committee contains in itself precisely the same principle. The people of those States can do it now. As I said before, neither the joint resolution reported by the committee, now before us nor my amendment contemplates disturbing or meddling with, in any way, the right of the State to regulate the qualification of voters and officeholders further than concerns the people of African descent; putting all classes of both colors on precisely the same level."[49]

Senator James R. Doolittle, a conservative Republican turned Democrat and a "lame-duck" from Wisconsin, opposed any amendment. He wanted to leave the right to fix voting qualifications to the states even where he disagreed with them. He gave as examples the Rhode Island property qualifications and the New York requirement that Negroes own $250 of property to vote. He also noted:

"Massachusetts imposes another, to wit, that no person shall be permitted to vote unless he can read the Constitution of the United States in the English language. That substantially excludes every foreign-born citizen who does not read the English language. It excludes, as a matter of course, every Negro who cannot

> read the English language. If you were to apply the qualification which is required in Massachusetts in South Carolina today, under this amendment proposed by the Senator from Michigan, I suppose four fifths, if not nine tenths, of all the Negro population in South Carolina would be excluded."[50]

To this, Sumner suggested that a lot of white men would be excluded by a literacy test, but Doolittle replied that they might be willing to accept this.[51] After Doolittle's speech, Howard's amendment was defeated by a vote of 35 to 16.[52]

Senator John Sherman, an Ohio Republican, said that there were five main grounds for restricting the franchise, race, property, religion, nativity, and education, and he gave the Massachusetts literacy test as an example of the last. He wanted to ban all of these tests, but Senator Cornelius Cole, a California Republican, objected to eliminating nativity because of a desire to prevent the Chinese from voting. By an amendment similar to that of Shellabarger's rejected proposal in the House, Senator Willard Warner, an Alabama Republican, moved to give every male an "equal vote at all elections," but objections to this, too, were raised, that it conferred amnesty on disenfranchised rebels, and that it eliminated residence requirements. This amendment was also rejected.[53]

The next morning, the Senate took up Wilson's proposed amendment to ban discrimination in voting based on "race, color, nativity, property, education or religious belief." This was defeated by 24 to 19. An amendment by Fowler giving all male adults "an equal vote in all elections" was defeated by a vote of 35 to 9. Several other amendments were also rejected by the Senate.[54] Various senators advocated that the amendment be limited to citizens so as to prevent the Chinese from voting.[55]

Shortly thereafter, Wilson offered the same amendment

which had previously been defeated, with only verbal changes. Sherman supported it, pointing to the Rhode Island property qualification and the Massachusetts literacy test for voting, and the New Hampshire religious test for public office, as things that should be eliminated.[56] Other senators supported it in spite of the fact that it would allow Chinese to vote. Senator Simon Cameron, a Pennsylvania Republican, expressed his disgust because of the "egotism" of his colleagues. He noted: "Almost every Senator has a proposition of his own, drawn by himself, expressing his own views, and it seems to be thought that no one else can correct or improve it."[57]

Senator Oliver P. Morton, an Indiana Republican, strongly endorsed Wilson's amendment. He declared that restrictions on discrimination in suffrage should not be limited to race and color alone. He opposed property, religious, or nativity tests. He also declared:

> "I believe all educational tests in this country are humbugs. They do no good. When you come to consider the question of voting as a natural right, what right have you to take it from a man because he cannot read and write? He may be, nevertheless, a very intelligent man, and he has his rights to defend and preserve just like other men, and the right of suffrage is just as important to him as it is to anybody else. What right have you to say that he shall not have it because he cannot read and write?"[58]

However, Howard opposed Wilson's amendment. He wanted only a limited provision which would strike at racial discrimination in voting. He objected that "this amendment is entirely too sweeping; it runs a plow-share through all the State constitutions and overturns the most important State regulations that can be found. For my part I am not prepared to go so far as that."[59]

Senator James W. Patterson, a New Hampshire Republican, also arose to oppose Wilson's amendment. He declared:

> "I want no distinction of caste, or color, or property, but I have always been in favor of the law of Massachusetts. I have hitherto been in favor of an educational test as a restriction upon the right of suffrage; nor am I prepared to say now, as one gentleman has said, that this is an idle restriction . . . to retain an educational test in our constitution or in our law.
>
> * * *
>
> "But, sir, it is certainly true that self-government is not possible until a people have advanced somewhat in civilization; and it pre-supposes the maintenance of that intelligence by commerce and schools, by the press, and restrictions of law upon the influx of barbarism and arbitrary power from abroad. A restriction of that kind is no wrong done to the voter, for it simply protects the purity and integrity of the Government under which all his rights are secured. . . . an ignorant population have [no right] to complain of the restriction of intelligence which guards the political institutions under which they live. Why, sir, the voter discharging the obligation of an elector fulfills an official duty as truly as the judge exercises the functions of an office when he administers justice between man and man; and as some knowledge of law is a prerequisite in the judge to the proper discharge of his duties, so it would seem that some intelligence, some mental discipline, some little knowledge of the laws and spirit of a country is necessary to a safe participation in its government.
>
> * * *
>
> "I know that as we stand today an educational test may not be necessary; but it will do no harm. If the people have the intelligence prerequisite to self-government an educational test will not limit very much the

> extent of suffrage. . . . It is simply a safeguard against a possible evil. . . . to protect and guard it [suffrage] against the incoming floods of ignorance and barbarism is simply to preserve the jewel of liberty."[60]

Wilson then arose to answer Patterson. He declared that he had always been opposed to an educational test in his state, that it was almost of no value there, and that it kept no more than 500 men from voting. Patterson noted, in response to a question, that "if you retain the right to make an educational test it will apply to black men as well as to white men."

But his main concern was not with Negroes, but with Chinese and other foreigners. He did not agree with Wilson that such a test was "petty and ridiculous" because "there is a possibility of a number of these uneducated foreigners, who do not understand the spirit of our institutions, coming into any State so as to override the native citizens of that State."[61]

Senator Roscoe Conkling, a New York Republican, opposed Wilson's amendment because it would "revolutionize and undo the constitutions, the enactments, and the customs of the States." He deplored the abolition of educational qualifications for holding office. He added:

> "Education in any degree whatever, either as a qualification of suffrage or officeholding, a standard of intelligence above the most groveling and besotted ignorance is to be beyond and above the power, above the prerogative of the States. Sir, licentiousness is not liberty and excess is not wisdom. . . ."[62]

Sherman arose to reply to Conkling. He deplored restricting the proposed amendment "on so narrow a ground" as race and color alone "that we are constantly apologizing

for its weakness." He asked: "Why should we protect the descendant of the African, when in certain States of the Union a man who has the misfortune not to be able to read and write cannot vote?" He opposed limiting the constitutional amendment to this one disability, and urged striking down other limitations. Sherman wanted restrictions only based on age, residence, and sex. He observed that the Massachusetts literacy test was useless, and stated that unless these other limitations were abolished by the amendment, people in Ohio would object that there was no adequate reason for protecting Negroes when white citizens were excluded from voting in Massachusetts because they could not read and write, and others are excluded from office in New Hampshire because they were not Protestants.[63]

A vote was then taken on Wilson's amendment, and in almost a full Senate, it carried by the narrow margin of 31 to 27, with 8 absentees. The Republican majority was badly split on this issue. The tiny Democratic minority furnished only eight votes to the losing side, and one to the winning side.[64] Warner again raised his amendment granting "the equal exercise of the elective franchise," but this lost by 47 to 5.[65] Finally, after tacking on an amendment providing for the popular election of presidential electors, the Senate passed the joint resolution by a vote of 39 to 16.[66]

C. The Second Senate Version.

The Senate amendment banning literacy tests raised a storm of protests among Republicans throughout the country.[67] Boutwell recommended that the House of Representatives refuse to concur and ask for a conference committee, but Bingham moved to concur.[68] He approved of eliminating disqualifications "on account of color, on ac-

count of the accident of birth, on account of want of educational qualifications, on account of creed, and on account of want of property; and all these grievances are remedied and covered by this amendment. . . ."[69] However, the House refused to concur in the Senate amendment by a lop-sided vote of 133 to 37, and asked for a conference committee instead.[70]

In the Senate, Stewart, who had charge of the Judiciary Committee's resolution, moved that the Senate refuse to give way to the House and agree to a conference.[71] Senator Charles R. Buckalew, a Pennsylvania Democrat, warned that in conference "the House of Representatives always insists that its particular views shall prevail, and in nine cases out of ten the House has its way. . . ."[72] Morton warned that if the amendment were delayed beyond the session, ratification by the states would be endangered, and declared that "if I cannot get my choice, perhaps I will take something that I think is not quite so good."[73]

Stewart then withdrew his motion for a conference committee, and moved that the Senate recede from its position and adopt the House amendment.[74] Wilson objected. Although he said that "I generally govern myself by this practical rule: to get whatever good I can get and advance as far as I can today, hoping to be able to advance further tomorrow," he declared that he wanted the right to hold office given to Negroes. He stated that this could probably be obtained in conference, and that only if it could not would he agree to the House version as it stood.[75] Conkling said that he preferred the House version,[76] Stewart found it acceptable, and Morton was prepared to acquiesce, saying: "I am satisfied that we cannot obtain the Senate amendments, and therefore I am willing to take one that is not so good, in my opinion, rather than to have the whole

measure fail.'"[77] The Senate then moved to recede by a vote of 33 to 24.[78]

The question was then taken on agreeing to the House version. When Wilson complained that it had no provision in it protecting the right of Negroes to hold office, Stewart rebuked him for "loading that (amendment) down" with other prohibitions, and advised the Senate that further delays "will cause the loss of everything." Sherman added that the Senate was "tired of this question," and was prepared to accept the House version.[79] Howard also noted that "This does not satisfy me, but I take it because it is the best I can get at the present time."[80]

Sumner, however, protested. He said:

> "I think that in putting this great article into the Constitution we ought to be careful that it is complete in form and that it does meet all the exigencies of the occasion. Does this meet those exigencies? Is it complete in power? Is there a single Senator who is in favor of a constitutional amendment who will say that it is complete in form, or that it meets all the exigencies of the occasion? I believe there is not one Senator . . . who will affirm that it does. Now, sir, shall we, under the circumstances . . . be driven to adopt this imperfect proposition? I hope not."[81]

But Stewart told the Senate:

> "is he not willing to take the proposition which the House of Representatives sends to us, which accomplishes a great deal, rather than to take the risk of having our proposition again loaded down? . . . The only hope for getting anything is to vote for this proposition, . . . if you send it again and again to the other House, and it has to be sat out again and again, I tell you the session is too near a close to accomplish anything . . . because I cannot get everything I want now I

am not to reject what I can get. I am for taking what we can get now, . . .[82]

Sawyer did not see it that way. He told Stewart:

"I see no particular reason why the Congress of the United States should be in such a hurry about this. If the country has not come up to that condition of public sentiment yet which will enable it to adopt the principle of manhood suffrage, let us wait until the country is at that point. I am not obliged here, I do not feel bound here, to vote for an amendment to the Constitution which accomplishes nothing and under which any State may pass a law which shall disfranchise four fifths of the colored population without mentioning the word 'color'; and I do not hold myself ready to answer to the appeal which has been made by the distinguished Senator from Nevada to vote for this or we shall have nothing. I would rather have nothing than to have this; . . ."[83]

By this time, it had become quite obvious that the Senate majority was at war with itself. Senator William P. Fessenden, a Maine Republican, observed that "the Republican party, with a majority of more than two thirds in the Senate, cannot pass any measure or do anything, it is so cut up and divided, and there are so many opinions among the members composing it," if the Senate did not come to a vote at once. It did not do so.[84] In fact, by a vote of 32 to 24, it refused to reconsider the vote by which it receded from its amendments, and so divided were the Republicans that the tiny ten-man opposition delegation provided the balance of power. Moreover, although Frelinghuysen urged the Senate to adopt the House version, in spite of the fact that he preferred the Senate version, the vote on adoption stood 31 yea, 27 nay, less than the requisite two-thirds.

The result was that the Senate majority was so split that it was completely stymied.[85]

Stewart then moved to take up the original Senate Judiciary Committee draft. Senator James W. Nye, a Nevada Republican, opposed further work on the subject. He was clearly disgusted, saying:

> "when the House of Representatives present to us a constitutional amendment providing that negroes shall have the right to vote, I am surprised to see gentlemen who have labored for twenty years to get that provision into the Constitution, upon which more eloquence has been expended and more zeal displayed than upon all other questions that they have discussed, voting with the enemies of the proposition upon principle, for the mere purpose of gratifying their own whim. I am opposed to the further discussion of a measure upon which there is no possibility of agreeing. . . . I have no sort of belief that if we sat here until the 4th day of March at twelve o'clock there would be any constitutional amendment voted on that would be agreed upon by both Houses of Congress. If you adopt this proposition and send it to the House of Representatives they will send it back, and the two Houses will be playing shuttlecock with thte Constitution and its amendment, which is doomed to death in the end."[86]

But the Senate continued on considering the amendment. When Senator Adonijah S. Welch, a Florida Republican, insisted on including office-holding in the amendment, Howard replied that the amendment constituted an implied repeal of the constitutional provision forbidding religious tests for federal officers.[87] And Fowler said:

> "the propositions before us ignore the rights of all the white men of the country who are now divested of

this great right [to vote]. When this measure is adopted they will remain divested of the right by the States and by the Government of the United States. Why not rise up to the point that you will give to your own race a privilege or a right which you guaranty to another and an inferior race? . . . I contend that any amendment of the Constitution that does ignore the rights of the white men who are disfranchised throughout the United States is an amendment unworthy of the age. . . . Carry the proposition to the colored men in the Southern country and they will vote today to give this right to the disfranchised whites. They would spit upon such a proposition as this—a proposition in which their own rights are attempted to be secured, while it tramples down the rights of their own white fellow-citizens. . . . There is not a decent black man in all the Southern States who would not scorn such a proposition as this; and yet we are told . . . that nobody's rights are to be guarded except those who are marked by race, color, or previous condition of servitude, because these are specific qualities that are named and our attention is directed to them, and to them alone. For all other reasons a State may divest a man of his right to vote; for all other causes he may be deprived of this right; . . ."[88]

Senator Lyman Trumbull, an Illinois Republican lawyer, in the course of further discussion, said that it was not his understanding that the proposed amendment was designed "to give to the United States the regulation of suffrage . . . (but) to prohibit the States from denying" it. Senator George F. Edmunds, a Vermont Republican, stated that the prohibition against the United States was designed for the same reason in respect to the District of Columbia and the territories. To this Howard replied that "it is an irresistible inference from the very language we use" that Congress "may in any test that is not prohibited by this

article," restrict voting, such as "a religious test, an educational test, a property test." Howard also said that he differed with Edmunds, and believed that Congress would be given the power to prescribe the qualifications for officials by this amendment.[89]

After some more debate, Nye arose again to urge that the Senate pass the House version and be done with the subject. He suggested:

> "Does it not go far enough? If it does not, let us take what we can get. Long ago did I learn the lesson that it was better to hold that which we could obtain than to lose all by grasping for too much."[90]

Wilson answered Nye by justifying his amendment, but noted that when it "was so decisively rejected by the Representatives of the people I regretfully but readily abandoned it." He added: "The time is not perhaps ripe for its adoption; but if the spirit of a refining, elevating, Christian civilization shall continue to advance the time will come when the ctizens of the United States will not be restricted in their civil and political rights and privileges by the race to which they belong, the color of their skin, the place where they were born, the property they may possess, the education they may have acquired, or their religious belief."[90]

Next, Howard offered the amendment that the Senate had previously voted down, namely: "Citizens of the United States of African descent shall have the same right to vote and to hold office in the States and Territories as other citizens." When asked by Edmunds why it was limited only to Negroes, Howard replied that there was no complaint that anyone else was being denied the right to vote. He suggested that the Senate come right out and say what it

meant.[92] However, once again Howard's amendment lost, this time by a vote of 27 to 22, with ten negative Democratic votes holding the balance of power in the closely divided majority."[93]

Upon a motion to reconsider, Senator Roscoe Conkling, a New York Republican lawyer, urged the adoption of Howard's amendment on the grounds that the committee draft could be easily evaded. He noted:

> "in substance it is that no citizen shall be excluded from the right to vote or hold office on account of race, color, or previous condition of servitude. Upon the interpretation of everybody a man may be excluded for any other reason, may he not? Let us see what other obvious reasons, if they exist, would exclude the very class of which we are speaking."[94]

He gave as an example a voting restriction based on the fact that the slave parents of Negro freemen were never legally married, or that they were sons of slaves. However Edmunds and Stewart indicated that the House Draft would cover this type of evasion. Conkling then added that "in addition to the modes which I suggest, . . . I could point out a number of other modes in which it would require but slight ingenuity to circumvent this proposed amendment." Edmunds and Stewart retorted that Howard's amendment could be equally evaded, and the latter gave as an illustration the fact that if all males of illegitimate birth were barred from voting, more Negroes than whites would be excluded.[95] Indeed, Howard himself indirectly supported this view, when he declared:

> "The effect of it . . . is simply to subject the African race to the same restrictions and qualifications that prevail as to every other class of citizens within the

> state. Of course they would be subjected to an additional qualification if the State saw fit to make one, or to a property qualification, or any other qualification the State might see fit to apply, except the qualification of race and color."[96]

Howard's amendment lost on reconsideration by a vote of 29 to 16. The vote was then taken on the Judiciary Committee draft, and it carried by 35 to 11, with almost all of the regular Republicans present supporting it.[97]

D. The Conference Report.

When the Senate substitute came before the House, Bingham moved to tack on a modified form of the Wilson amendment in that body. Boutwell reminded Bingham that the House had twice rejected similar provisions.[98] Shellabarger also asked leave to offer his original amendment, slightly modified, giving all male citizens "an equal vote at all elections."[99] In support of his proposal, Bingham said:

> "Why, equality of the law is the very rock of American institutions, and the reason why I desire to amend this proposition of the Senate is that as it stands it sweeps away that rock of defense by providing only against State usurpation in favor of colored citizens, to the neglect of equal protection of white citizens. While colored citizens are equal in rights with every other class of citizens before the majesty of American law, as that law stands written this day, I am unwilling to set them above every other class of citizens in America by amending the Constitution exclusively in their interest. The import of my amendment is to protect all classes alike, and I ask a vote upon it.
>
> ". . . But that all citizens, native-born and naturalized, black and white, may be equal, so far as political rights

> are concerned, under the operation of the Federal Constitution, I ask leave of this House to insert the additional words 'nativity, property, creed.' . . . If my amendment shall be adopted you will strike down as well the constitutions of other States, as for example the State of Rhode Island, which wrongfully and unjustly discriminates this day by property qualifications against naturalized citizens of the United States as compared with native-born citizens, . . . I would have inserted the other word 'education,' but I know that the general sense of the American people is so much for education, that chief defense of nations, that if they will not take care of that interest they will take care of nothing."[100]

A vote was thereafter taken on Bingham's amendment, and it carried by 92 to 70. Shellabarger then withdrew his proposed amendment, and the House proceeded to pass the joint resolution by a vote of 140 to 37.[101]

However, the Senate disagreed with the House version, and the measure went to conference.[102] The result of the conference report was an amendment in the terms of the present Fifteenth Amendment. The right to hold office was struck out, as was any limitation except that based on race, color, or previous condition of servitude.[103] The conference committee had come back full circle to the original, very limited House Judiciary Committee draft.[104] This the House approved by a vote of 145 to 44 without debate.[105]

The Senate was clearly in a quandary. Many senators were unhappy with the change, but the conference report was not taken up until February 26, 1869, and the session and Fortieth Congress was due to expire on March 3rd. There was not enough time left to rework the entire proposition between the two houses. If the amendment was not passed, it would have to be taken up by the Forty-First

Congress. There was some doubt that, with increased Democratic representation in the House of Representatives, a two-thirds majority could be found there to pass an amendment in the new Congress.[106] Moreover, Negro suffrage was not popular in many key northern states, and the Republicans had every good reason to fear that if the amendment was postponed, by the time it reached the states Democratic legislatures hostile to the amendment would be elected replacing the Republican legislatures elected on Grant's "coat-tails," and the amendment would not be ratified.[107] Indeed, the Republicans had resisted every effort by the minority to have the amendment submitted to legislatures or conventions chosen after it was proposed, so fearful were they of popular rejection.[108] The dominant party was thus faced with a choice of accepting an unpalatable conference report or taking the risk of postponing the whole matter, thus jeopardizing ratification.

Senator Samuel C. Pomeroy, a Kansas Radical Republican, was the first to protest, but Stewart, one of the conference members, defended his compromise.[109] Howard added:

> "I shall vote to concur in the report not because this amendment of the Constitution as presented is entirely satisfactory to me, but because I think that it is at present the best that can be obtained. I must content myself, therefore, with the best I can get and run the risk of the future. . . . It will be observed from the language of the report now before us that it does not confer upon the colored man the right to vote. I wish it did; . . . This, however, confers no right to vote. It declares that 'the right of citizens of the United States to vote shall not be denied or abridged,' etc., without imparting the right itself."[110]

Edmunds, a dissenting member of the conference committee, also vigorously castigated the report, but said that he would not vote against it.[111] Wilson lamented the loss of his amendment which "covered the white man and prohibited distinctions on account of nativity, property, education, or creed." He added:

> "If the black man in this country is made equal with the white man—and I hope he soon will be—I mean, by the blessing of God, while I live to hope on and to work on to make every white man equal to every other white man. I believe in equality among citizens—equality in the broadest and most comprehensive democratic sense. No man should have rights depending on the accidents of life."[112]

But Wilson added:

> "I have asked always for what was right and taken on all occasions what I could get. I have acted upon the idea that one step taken in the right direction made the next step easier to be taken. I suppose, sir, I must act upon that idea now; and I do so with more sincere regret than ever and with some degree of mortification. . . . I am going to vote for this proposition without taking any responsibility for it. I am not responsible for this half-way proposition. I simply take it at this late hour as the best I can get after having struggled for the right to vote and the right to hold office. . . . If there is an opportunity to get the right to hold office I will do it; I take no risk, for I am determined to take what I can get if I cannot get all I demand."[113]

Morton was also dissatisfied. He seemed content that the House had struck out the ban on literacy tests, but strongly favored banning discrimination based on nativity, property, or religion in voting qualifications. However, he declared:

> "I shall probably vote for this report made by the committee of conference, because I think I cannot do any better, for the reason that the time within which to act is so short. Time is important, and I am afraid if this matter is referred to another committee of conference the resolution may be lost altogether. I go upon the principle of taking half a loaf when I cannot get a whole one; . . . I may be compelled to take this proposition just as it is because at this late hour of the session if I do not take it I may not get anything; . . . As I said before, my position is peculiar. I will take what I can get and even be thankful for that."[114]

Sawyer was also clearly unhappy with the measure. After sharply criticizing it, he concluded: "If I vote for this proposition, . . . I do it with great reluctance, I do it with great hesitation, and I do it because I am advised that we must have something, and that this is the best we can get."[115] But Stewart answered him by decrying the position "that if you cannot have it right do not have it at all," and the following colloquy occurred:

> "MR. STEWART. . . . Every Senator must see that there is not time for further action.
>
> "MR. FRELINGHUYSEN. And no chance at the next session.
>
> "MR. STEWART. And no chance at the next session? Your Legislatures are waiting now, ready to act. Send it to another conference and the whole thing is lost.
>
> "MR. FRELINGHUYSEN. There will be no chance at the next session, because there will not be a two-thirds vote there for it.
>
> "MR. STEWART. And there must be two thirds in the other House. . . ."[116]

The Senate then recessed, and when debate resumed that evening, Buckalew observed that his prediction that the House of Representatives usually wins in conference had proved accurate.[117] Senator Justin S. Morrill, a Vermont Republican, arose to note that only four working days remained in the session, and that there was much other legislation to be acted on. He therefore observed: "From my knowledge of the state of business in each House I am prepared to believe that we must accept the report of this committee or abandon all hope of any amendment of the Constitution being proposed by this Congress. I would much prefer some different amendment from this. . . ."[118]

Senator Henry B. Anthony, a Rhode Island Republican, spoke next. He indicated satisfaction with the amendment because it did not alter Rhode Island's property qualifications for voting, and noted that if an amendment had been submitted which had done so, the Rhode Island legislature would not have ratified it. He added: "we have the satisfaction of knowing that without our State the necessary number of twenty-eight States cannot be obtained for ratification of any amendment whatever until new elections take place." Anthony got into something of a tiff with Wilson and told him that Rhode Island "takes the responsibility of managing her own affairs in her own way" even if "we fail to satisfy our friends in Massachusetts in our management of our internal affairs. . . ."[119]

Warner offered the last lamentation. He mourned:

> "I want respectfully but earnestly to enter my humble protest against the character of this amendment. While I shall probably vote for it in the shape it is, I shall do it rather in deference to the judgment of older and wiser men than myself than in accordance with my deliberate judgment."[120]

The Senate then voted on the conference report. Thirty-nine Republicans voted for it; and two regular Republicans plus eleven Democrats and conservatives voted against it. With a two-thirds majority finally obtained, the amendment carried.[121]

E. Subsequent Debate

The effect of the Fifteenth Amendment on literacy tests also arose during debate in the Forty-First Congress on enforcement legislation.[122] Congressman Richard J. Haldeman, a Pennsylvania Democrat, noted the fact that in spite of this amendment, the "States may still deny the right of suffrage . . . [for] want of property qualification, or want of education, or for wanting a period of residence sufficiently long to satisfy the State Legislature. . . ."[123] Congressman Benjamin F. Butler, a Massachusetts Republican lawyer who had voted for the Fifteenth Amendment, noted that the Massachusetts literacy test was "the stock denunciation against Massachusetts. . . ."[124]

In the Senate, Howard of Michigan continued his lamentation over how ineffectual the Fifteenth Amendment was, and the following colloquy with Stewart of Nevada, who had shepherded this amendment to passage, occurred:

> "Mr. Howard. . . . if it be the disposition of the people of Virginia to amend their constitution in such a manner as to ostracise and to exclude from the right of suffrage the colored population, in my humble judgment, the fifteenth amendment of the Constitution is of very little value, if of any at all. . . . So far as a State Legislature or a State convention should trench upon the rule expressed in the fifteenth amendment relating to race, color, and previous condition of servitude, and to those subjects only, its legislation would be void, and Congress could interfere under the second

clause of the amendment to correct that legislation. To that I agree; but suppose the State affixes as a qualification of a voter the necessity of being the owner of, say, two hundred dollars' worth of property. Suppose the State should alter its constitution so as to require from the colored man the posession of his own right of two hundred dollars' worth of property, which is the old rule in the State of New York, does the Senator from Nevada hold it to be in the power of Congress to alter in any way by congressional enactment that qualification of the State? No, sir. Why not? Because the qualification does not relate to color, race, or slavery, but only to property, the subjects being as distinct from each other as the sun is from the moon. No, sir; Congress in such a case as that would have no authority whatever to interfere to correct the evil. We should be bound by the constitutional amendment itself; we should be tied up to those three specific subjects—race, color, and servitude—and we could make no inquiry beyond those particulars.

"MR. STEWART. A law of that kind would necessarily be general, would it not? If applied in that form, making a property qualification, it would have to be general and apply to whites as well as blacks? . . .

* * *

"MR. HOWARD. . . . Suppose the State of Virginia passes a general act or inserts a general clause in its constitution requiring that every voter shall possess in his own right property to the amount of $200, or any other specific sum, will he undertake to deny that under that clause of the Constitution, the fifteenth amendment, it would be competent for Virginia or any other State to enact such a provision? Certainly not. He must admit it. Well, sir, how many colored people in Virginia would be allowed to vote under such a restriction? Not one out of a hundred, I undertake to say, and hardly one out of a thousand. . . . Now, does the Constitution anywhere say, does even the fifteenth

amendment, which is the Senator's great panacea, say that a State shall not impose restrictions upon the right of suffrage? No sir; there is nothing of the kind in the Constitution, nothing of the kind in the fifteenth amendment except that no distinction shall be made in cases in which color, race or slavery is involved. That is the sum total of that amendment. The State of Virginia . . . can by her Legislature, . . . propose such an amendment to her local constitution as shall in effect disfranchise nine hundred and ninety-nine out of a thousand of the colored population of that State, by imposing a property qualification upon them, and it would be no violation of the fifteenth amendment.

"MR. STEWART. . . . We do not want the admission of the Senator from Michigan; it may come up in debate hereafter. Does he think she can pass any law or make any device whereby ninety-nine hundredths of the black population can be disfranchised? Would it not be in violation of the Constitution, so as to give Congress the power to interfere?

"MR. HOWARD. I know no clause in the Constitution of which it would be a violation. The States have exercised the power of controlling, regulating, and restricting popular suffrage from the commencement of the State governments down to the present time. It is one of the rights reserved to the States, and is to be exercised in its fullness and in its plentitude without any control on the part of Congress or any question being put by Congress to them; and that will be the case until the fifteenth amendment shall have been adopted, that amendment relating only to color, race, and slavery, not to property, not to educational qualifications, or anything except these three specific subjects. Now, sir, it will be the easiest thing in the world, were the Legislature of Virginia disposed to do so, to launch at once an amendment which would strike out of the hands of the colored men in that old Commonwealth the right to vote, and it would affect very few

> white people, . . . Sir, I insist that as to the black population this fifteenth amendment is of very little value if the State sees fit to take away the right of suffrage by affixing property qualifications or educational qualifications, or any qualifications whatever that do not relate to race, color, or slavery."[125]

Moreover, Senator Lyman Trumbull, an Illinois Republican lawyer who had voted for the Fifteenth Amendment, told the Senate:

> "Now, under the Constitution as amended . . . by the adoption of the fifteenth amendment, Congress has no control over the question of suffrage further than to prevent the States from discriminating on account of race or color; but any State may require a property qualification, may require an educational test, may impose such conditions upon voting as it thinks proper, so they are uniform on all classes of citizens. That power has not been taken away from the States. The only power that has been taken away from them is the authority to discriminate on account of race, color, or previous condition."[126]

But Senator Richard Yates, an Illinois ultra-Radical Republican, continued to denounce the Massachusetts literacy test aimed at foreigners and the New York property qualification for voting in some general declamation.[127]

Shortly thereafter, Senators Oliver P. Morton of Indiana and George F. Edmunds of Vermont, both Republican lawyers who had actively participated in the debate on, and voted for, the Fifteenth Amendment, got into the following colloquy:

> "MR. MORTON: . . . the question of suffrage is now, as it was before, completely under the control of the several States to punish violations of the right of suf-

frage, just as they had the power before, except that we take away their power to deny suffrage on account of race, color, or previous condition of servitude, and have given to Congress the power to enforce this amendment.

* * *

". . . But suppose the denial of the right of suffrage by a board of registration or a board of inspectors has nothing whatever to do with color; suppose it is for an offense that existed by State law before the enactment of this fifteenth amendment, what power have we got to interfere with that any more than we had before?

"MR. EDMONDS. Nobody, I think, would claim that we have. I should not say so."[128]

In accord with the foregoing views are those of Senator William T. Hamilton, a Maryland Democratic lawyer, who observed that the Fifteenth Amendment "does not confer upon Congress any power to establish the qualifications of electors in the States." Hamilton also noted that aside from the explicit prohibitions, "in all other respects the several States have within themselves . . . the full and perfect power to fix the qualifications of electors."[129] In replying to him, Senator Carl Schurz, a Missouri Republican, engaged in a long, generalized oration on the values of universal suffrage free from "arbitrary exclusions," but noted that "an educational test . . . will not affect the principle."[130]

During some debate, Senator Eugene Casserly, a California Democratic lawyer and a former Corporation Counsel of New York City, noted: "Except as to that class of citizens and causes, the [fifteenth] amendment leaves the whole subject of suffrage, including qualifications of voters, in the control of the States as fully as it had been for nearly eighty years before the amendment was thought of."[131]

Likewise, Senator Garrett Davis, a Kentucky Democratic lawyer who had participated in the debates on the Fourteenth and Fifteenth Amendments as an opponent of both, observed:

> "If the State of Kentucky was to pass a general property qualification law for voters, applicable to all whites and to all freedmen, it would be perfectly competent for that State to pass such a law, and it would not come under the inhibition or proscription of this fifteenth amendment, because the interdiction of the power of the State Legislator to act upon the subject of suffrage has application only to disqualifications on account of race, color, or previous condition. Of course any other qualification of suffrage, embracing that of Massachusetts, that a voter shall be able to read before he is entitled to vote, or that he shall have paid his taxes, State, national, and municipal, before he is entitled to vote, and shall have received a certificate of the payment; or the qualification of the State of Rhode Island, that a man who is a foreigner by birth shall have a certain amount in value of real estate before he is entitled to vote, would not touch the prohibition which the fifteenth amendment puts upon the power of Congress or upon the power of any State Legislature."[132]

Senator Joseph S. Fowler, a Tennessee Republican lawyer who had opposed the Fifteenth Amendment because it was too narrow, in again criticizing it noted:

> "The article, in its first section, is a mere prohibition upon the United States and the States, and a prohibition that protects three characteristics or conditions. There is here no grant of power to the General Government. . . . While it protects race it ignores sex, property, intelligence, virtue, service, religion, profession, etc."[133]

Congressman Michael Kerr, an Indiana Democratic lawyer, who had voted against the Fourteenth and Fifteenth Amendments, made this observation about the latter:

> "It does not confer the right to vote. It only forbids the denial by the States or by Congress of the right to vote on account of race, color, or previous condition of servitude. But the right itself must be derived from and enjoyed in accordance with the laws of the States. Its regulation pertains to them alone. This amendment does not say they may not deny or abridge suffrage at their pleasure, but only that they shall not do so 'on account of race, color, or previous condition of servitude.' For all other causes, applicable alike to citizens of all colors, races, and conditions, the powers of the States are as plenary as they were before the pretended ratification of the amendment."[134]

Kerr also noted that nine-tenths of the Negroes in the Southern States could be disenfranhcised if these states instituted the Massachusetts English language literacy test "without any infringement of either the letter or spirit of the fourteenth and fifteenth amendments."[135] Moreover, Congressman John A. Bingham of Ohio, the Radical Republican lawyer who had drafted the First Section of the Fourteenth Amendment, noted that to be protected under the bill enforcing the Fifteenth Amendment, a citizen must "otherwise [have] the qualifications required by such State of voters."[136] Indeed, even persons of foreign birth can be discriminated against by the states, because the House was told that the word "nativity" was struck out by the conference committee from the proposed draft of the Fifteenth Amendment to allow the West Coast states to exclude the Chinese from voting there.[137]

During debate in the Third Session of the Forty-First Congress, on a bill to enforce the right to vote, Bingham,

who had proposed a ban on literacy and property qualifications in the Fifteenth Amendment without success, was asked about the Massachusetts literacy test and the Rhode Island property qualification for voting and replied that the "State prescribes the qualifications of the electors. . . ."[138] Likewise, Senator George Vickers, a Maryland Democratic lawyer who had participated in the debates on the Fifteenth Amendment and voted against it, observed:

> "The fifteenth amendment comes in as a proviso or addendum to the power originally reserved to the States, and says that in fixing the qualifications for voters the States must not discriminate among the people on account of race, color, or previous condition of servitude. The States have the constitutional power today to prescribe any condition to the right to vote, except as to race or color and former condition of the person. They may prescribe as qualifications for voters . . . education, and define the branches and extent of it; also a property qualification; also that a voter shall have been a citizen of the State for five, ten, or any number of years. . . . Age and residence are completely in their province to declare. . . . It will be seen that the primary and essential power is in the States. . . . But the only restriction upon a State is that by her legislation she shall not deny this privilege of franchise on account of race, color, or previous condition of servitude. She may virtually deny it, by prescribing educational or property qualification, or residence or citizenship for a period of time, or any other; except that of race or color."[139]

The Rhode Island property qualification also came up again. In response to a question by Senator Henry B. Anthony, a Republican from that state, Senator Thomas F. Bayard, a Delaware Democratic lawyer who, like

Anthony, had participated in the debates on the Fifteenth Amendment, remarked that the state discriminated against naturalized citizens by requiring them to own real property to vote, and "that LaFayette could have lived there till now, and if he happened to be poor and had not the requisite amount of property he could never have voted under the constitution of Rhode Island; and no Act of Congress could have enabled him to vote there."[140] Likewise, Senator Francis P. Blair, a Missouri lawyer who changed from Republican congressman to Democrat to become the unsuccessful vice-presidential candidate in 1868, noted:

> "There is but one State in this Union, . . . that makes any discrimination by its laws now against any of its citizens in the matter of suffrage; and when this fifteenth amendment was under consideration the Senators and Representatives from that State showed a marked jealousy in regard to it. It is the State of Rhode Island, which by law prohibits any foreign-born citizen from voting unless he is the owner of a certain quantity of land; and there is not land enough in the State for any large number of people to be the owners of. [Laughter] . . . This fact was well known to the Senate, well known to the members of the House, well known to the people of the whole country, and was a subject of discussion in this Chamber at the time the fifteenth amendment was acted on."[141]

Thereafter, debate on literacy tests and the Fifteenth Amendment becomes scanty. In the First Session of the Forty-Second Congress there is a passing reference to the fact that of the 63 members of the South Carolina legislature, 50 were Negroes, of whom 28 were completely illiterate and 14 more could not write their names.[142] In the next session, Senator James Harlan, an Iowa Republican lawyer and a former university president who had voted for

the Fifteenth Amendment, decried educational qualifications for voting or holding office, saying: "in my opinion the success of free government does not depend on scholastic attainments."[143] During the Forty-Third Congress, Congressman John O. C. Atkins, a Tennesse Democratic lawyer, told the House:

> "The State of Massachusetts has an educational qualification, and any black man resting under that educational disability, or white man either, cannot vote. Hence you see that the State, except the single limitation imposed by the fifteenth amendment that suffrage shall not be withheld on account of race, color, or previous condition of servitude, has supreme control over this great bulwark of liberty, the elective franchise—even the power to prescribe the qualifications of voters is not asserted, for Congress by the terms of this amendment—its power is only negative—it confers no power, but simply imposes an impediment or limitation for certain causes upon the powers of the State in the all-important right of suffrage. Suffrage, then, the boon of an American citizen, is not derived from the Federal Government, but is essentially a right granted and controlled by the State."[144]

During the same session, mention was made in the Senate of the Rhode Island property qualification.[145]

A little later in the session, Morton had occasion to comment on the effect of the Fifteenth Amendment with some fullness. He declared:

> "The fifteenth amendment does not provide that any colored man shall have the right to vote; it makes no such provision, but it says that no man shall be denied the right of suffrage because of his color. In other words, the States may still prescribe a property qualification on the right of suffrage, the States may say

that no man shall have the right to vote unless he has five hundred dollars' worth of property, or that no man shall have the right to vote unless he is twenty-five years of age, or, as they do in Massachusetts, that no man shall have the right to vote unless he can read and write. The States may still say that; but these conditions must be made applicable to men of all colors. There is the point.

"What the fifteenth amendment says is that the conditions or restrictions upon suffrage, whatever they may be, must be equally applicable to all races. The State of North Carolina has a right now to provide in her constitution that no man shall have the right to vote unless he has $1,000 worth of property, but it cannot confine that to the colored race or the white race; it must be equally applicable to all. In other words, whatever may be the conditions of suffrage, either liberal or illiberal, it must not be made to depend upon color, and that is the whole of the fifteenth amendment."[146]

Senator Eli Saulsbury, a Delaware Democratic lawyer, also made considerable reference to the Massachusetts and Connecticut literacy tests for voters, and the Rhode Island property qualification which discriminated against foreign born citizens.[147] Senator Augustus S. Merrimon, a North Carolina Democrat and a former state judge, noted that the Fifteenth Amendment only forbade discrimination in the three causes set forth therein. He further observed:

"But notwithstanding that inhibition, it is perfectly competent for any state to have a provision in its constitution providing that no person shall vote unless he can read or write. Indeed, in some of the States anyone who cannot read is prohibited from voting."[148]

Merrimon also declared during the next session:

> "The several States cannot prohibit anybody from voting for any one of three reasons, . . . but for any other reason or cause they may prohibit a person from voting. They may prohibit men from voting because they cannot read, because they cannot write, because they do not own so much property. In some of the States today those who cannot read and write are not allowed to vote; and I believe in one State of the Union there is a property qualification. At any rate these distinctions are kept up; and the only point of view in which the States are restricted as to their control over the right of suffrage is the one contained in the fifteenth amendment, that men shall not be prohibited from voting on account of race, color, or previous condition of servitude. But with this exception, this limitation, the power that the States exercised before the adoption of this amendment remains there to this day. . . ."[149]

This was all the debate during the reconstruction period.

F. Summary and Conclusions.

The question of the extent to which the Fifteenth Amendment restricts the right of the states to prescribe literacy tests for voting, is not difficult to ascertain. The legislative history, indeed, is singularly free from ambiguity.

Literacy tests were well known at the time of the proposal by Congress of the Fifteenth Amendment. An attempt was made to forbid them, in part on the ground that southern states would use them as a device to reduce Negro voting. The attempt was originally successful in the Senate, but ultimately failed for a variety of political reasons. Such failure of the attempt to ban state literacy tests means that states are constitutionally at liberty to exercise their pre-

existing power to require literacy tests of voters of such a kind as they may choose, in such language as they may deem desirable, with such a degree of difficulty as they may care to impose, all in their uncontrollable discretion, as long as they do not require such tests of members of one race and omit them as to members of another. The states may abolish, institute, or alter such literacy tests at any time for any reason whatsoever which seems to them to be sufficient, and so long as these tests are applied at that particular time to members of all races, no violation of the Fifteenth Amendment is committed; no one's rights are violated; and hence any attempt by Congress to interfere with such literacy tests is not an enforcement of the Fifteenth Amendment permitted by the Second Section thereof, but is an act in excess of the constitutional power which the states have surrendered to the federal government, and is *ultra vires*, and void.

FOOTNOTES

[1] Congressional Globe, 40th Cong., 3rd Sess., p. 9 (1868); *id.* at pp. 286, 542 (1869). Citations to the Congressional Globe or Record will hereafter be made by Congress, session, page, and date. For example, the foregoing citation would read: 40 (3) Globe 9 (1868); 40 (3) Globe 286, 542 (1869).

[2] 40 (3) Globe 638-9.

[3] 40 (3) Globe 645, 673, 904, 1012, 1314-5, 1633, App. 167.

[4] 40 (3) Globe 668.

[5] 40 (3) Globe 706.

[6] 40 (3) Globe 707-8.

[7] 40 (3) Globe 708.

[8] 40 (3) Globe 710.

[9] 40 (3) Globe App. 97. See also *id.* at 652 (Cong. Shelby M. Cullom), 724 (Cong. Hamilton Ward).

[10] 40 (3) Globe App. 98. Congressman William Higby, a California Republican lawyer said: "The opponents of this measure cannot with truth assert that power is to be centralized by . . . [the amendment] since power is not given but taken away from both Federal and State governments; but the power to control the elective franchise for other conditions than those named in the proposed amendment is allowed to repose where it now rests." (40 (3) Cong. Globe App. 294).

[11] 40 (3) Globe 722.

[12] 40 (3) Globe 724.

[13] 40 (3) Globe 725.

[14] *Ibid.*

[15] 40 (3) Globe 726.

[16] 40 (3) Globe 726-7. Bingham's proposal read: "No State shall make or enforce any law which shall abridge or deny to any male citizen of the United States of sound mind and twenty-one years of age or upward the equal exercise of the elective franchise. . . ." *Id.* at 722.

[17] 40 (3) Globe 727.

[18] 40 (3) Globe 728.

[19] *Ibid.* See also *id.* at 743:

"MR. SHELLABARGER. And the provision suggested yesterday in relation to qualifications grounded on intelligence, etc., are now out of the case?

"MR. BOUTWELL: They were voted down yesterday by the House two to one."

[20] 40 (3) Globe App. 102.

[21] 40 (3) Globe App. 103.

[22] 40 (3) Globe 743.

[23] 40 (3) Globe 744.

[24] *Ibid.*

[25] 40 (3) Globe 745.
[26] 40 (3) Globe 855.
[27] 40 (3) Globe 861.
[28] 40 (3) Globe 862.
[29] 40 (3) Globe 863.
[30] *Ibid.*
[31] 40 (3) Globe 899.
[32] 40 (3) Globe 900.
[33] 40 (3) Globe 900-1.
[34] 40 (3) Globe 902.
[35] 40 (3) Globe 907, 909.
[36] 40 (3) Globe App. 168-9. See the reference to literacy tests in 40 (3) Globe 1440.
[37] 40 (3) Globe 939. See also *id.* at 984.
[38] 40(3) Globe 979.
[39] *Ibid.*
[40] 40 (3) Globe App. 199. See also 40 (3) Globe 1638.
[41] 40 (3) Globe 985. See also *id.* at 999: "I will not vote directly or by implication authority to prescribe any such test as that of religious creed, education, property, or anything else. . . ."
[42] *Ibid.*
[43] 40 (3) Globe App. 154. See also 40 (3) Globe 1009, 1014.
[44] 40 (3) Globe 1008.
[45] 40 (3) Globe 1009.
[46] *Ibid.*
[47] *Ibid.*
[48] *Ibid.*
[49] 40 (3) Globe 1010.
[50] 40 (3) Globe 1011.
[51] *Ibid.*
[52] 40 (3) Globe 1012.
[53] 40 (3) Globe 1013.
[54] 40 (3) Globe 1029.
[55] 40 (3) Globe 1030-1, 1033-5.
[56] 40 (3) Globe 1035.
[57] 40 (3) Globe 1036.
[58] 40 (3) Globe 1037.
[59] *Ibid.*
[60] *Ibid.*
[61] 40 (3) Globe 1038.
[62] *Ibid.*
[63] 40 (3) Globe 1039.
[64] 40 (3) Globe 1040.
[65] 40 (3) Globe 1041.
[66] 40 (3) Globe 1044.

[67] Mathews, "Legislative and Judicial History of the Fifteenth Amendment," 27 Johns Hopkins Univ. Studies in Historical & Political Science 11 [305] 34 [328] (1909), citing editorials in New York Times, Feb. 15, 1869; The Nation, Feb. 18, 1869, p. 126; Harper's Weekly, Feb. 27, 1869, p. 131; and Wendell Phillips in Anti-Slavery Standard, Feb. 20, 1869.

[68] 40 (3) Globe 1224.

[69] 40 (3) Globe 1225.

[70] 40 (3) Globe 1226.

[71] 40 (3) Globe 1284.

[72] 40 (3) Globe 1285.

[73] 40 (3) Globe 1287.

[74] 40 (3) Globe 1289.

[75] 40 (3) Globe 1291. See also *id.* at 1298 (Sen. Joseph C. Abbott R.—N. C.)

[76] *Ibid.*

[77] 40 (3) Globe 1292.

[78] 40 (3) Globe 1295.

[79] 40 (3) Globe 1296.

[80] 40 (3) Globe 1297.

[81] 40 (3) Globe 1298.

[82] 40 (3) Globe 1298-9.

[83] 40 (3) Globe 1299.

[84] 40 (3) Globe 1300.

[85] *Ibid.*

[86] 40 (3) Globe 1300-1.

[87] 40(3) Globe 1301.

[88] 40 (3) Globe 1304. Fowler also said: "the Government of the United States may limit his right to vote on all other grounds . . . this mention of certain limitations which may not be placed upon his rights . . . [gives] the Congress of the United States the clear right to limit them in other respects. It is clearly an acknowledgement that the Government may do that thing." Id. at 1307-8.

[89] 40 (3) Globe 1304-5.

[90] 40 (3) Globe 1306.

[91] 40 (3) Globe 1307.

[92] 40 (3) Globe 1308. See also *id.* at 1309.

[93] 40 (3) Globe 1311.

[94] 40 (3) Globe 1316.

[95] *Ibid.* See also *id.* at 1317.

[96] 40 (3) Globe 1317.

[97] 40 (3) Globe 1318.

[98] 40 (3) Globe 1425.

[99] 40 (3) Globe 1426.

[100] 40 (3) Globe 1427.

[101] 40 (3) Globe 1428.
[102] 40 (3) Globe 1466, 1470, 1481, 1495.
[103] 40 (3) Globe 1563.
[104] 40 (3) Globe 726.
[105] 40 (3) Globe 1564.
[106] 40 (3) Globe 1629-1631. The Republican delegation in the Forty-First Congress was 149; the Democratic delegation was 63. U. S. Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1957*, 691 (1960).
[107] See 40 (2) Globe 40, 49, 50 (1867); 40 (2) Globe 466, 1065, 1963 (1868); 40 (3) Globe 1309, 1311, 1633 App. 167 (1869). See also 41 (3) Globe 1250-2 (1871).
[108] 40 (3) Globe 671-4, 707, 711, 912-3, 1040-1, 1311-5, 1425, 1633 App. 206.
[109] 40 (3) Globe 1623-5.
[110] 40 (3) Globe 1625.
[111] 40 (3) Globe 1625-6.
[112] 40 (3) Globe 1626.
[113] *Ibid.* See also *id.* at 1627: "If I cannot get all, I will take a part . . . I cannot take the responsibility of defeating this amendment. . . ."
[114] 40 (3) Globe 1627-8. See also *id.* at 1632, 1640.
[115] 40 (3) Globe 1629.
[116] *Ibid.*
[117] 40 (3) Globe 1639. See n. 72, *supra.*
[118] 40 (3) Globe 1639.
[119] 40 (3) Globe 1640.
[120] 40 (3) Globe 1641.
[121] *Ibid.*
[122] Enforcement Act of 1871, 16 Stat. 140, ch. 114, Force Act of 1871, 16 Stat. 433, ch. 99. See also the Ku Klux Klan Act of 1871, 17 Stat. 13, ch. 22.
[123] 41 (2) Globe 40 (1869).
[124] 41 (2) Globe 291. And note the petition to Congress by Massachusetts citizens protesting literacy tests there. *Id.* at 1337. For a discussion of the dangers of an illiterate electorate, see *id.* at 765-6, 1493.
[125] 41 (2) Globe 599-600 (1870).
[126] 41 (2) Globe 1363.
[127] 41 (2) Globe 3336.
[128] 41 (2) 3571.
[129] 41 (2) Globe App. 353.
[130] 41 (2) Globe 3609.
[131] 41 (2) Globe App. 472. He also said: "There was in the country another large class of persons, of the white race, natives of Europe, who though declared to be 'citizens' of the United States by the

fourteenth amendment, had been or were still denied . . . 'the right to vote' in one or more States, and might be in all, on account of nativity or the want of a property qualification, or both. By the peculiar working of the fifteenth amendment all this class was and is excluded from its benefits."

[132] 41 (2) Globe 3667. See also *id.* at 3804, referring to Rhode Island voting restrictions.

[133] 41 (2) Globe App. 421.

[134] 41 (2) Globe 3872.

[135] 41 (2) Globe 3875. See also mention of a literacy test in 41 (2) Globe App. 433.

[136] 41 (2) Globe 3883.

[137] 41 (2) Globe 4275, 4278.

[138] 41 (3) Globe 1284 (1871).

[139] 41 (3) Globe 1635.

[140] 41 (3) Globe App. 162.

[141] 41 (3) Globe App. 158.

[142] 42 (1) Globe App. 160 (1871).

[143] 42 (2) Globe 878-9 (1872).

[144] 43 (1) Record 454 (1874). See also H.R. Rep. No. 22, 41st Cong., 3rd Sess. 1 (1871); S. Rep. No. 21, 42nd Cong. 2nd Sess. 1, 4-5 (1872).

[145] 43 (1) Record 950.

[146] 43 (1) Record App. 360.

[147] 43 (1) Record 4161.

[148] 43 (1) Record App. 314. See also 43 (2) Record 944 (1875).

[149] 43 (2) Record 1796 (1875).

CERTIFICATE OF SERVICE

I, R. D. McIlwaine, III, an Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of counsel for the Commonwealth of Virginia as *amicus curiae* in the above-captioned matter, hereby certify that copies of the Appendix to the Brief on Behalf of the Commonwealth of Virginia, *Amicus Curiae,* have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post Office, with first class postage prepaid, this 17th day of December, 1965, pursuant to the provisions of Rule 33(1) of the Rules of the Supreme Court of the United States, as follows: Daniel R. McLeod, Esq., Attorney General of South Carolina, Wade Hampton Building, Columbia, South Carolina, and David W. Robinson, Esq. and David W. Robinson, II, Esq., Special Counsel, P. O. Box 1942, Columbia, South Carolina, counsel for plaintiff State of South Carolina; and upon Nicholas deB. Katzenbach, Esq., Attorney General of the United States, and Thurgood Marshall, Esq., Solicitor General of the United States, Department of Justice, Washington, D. C., 20530, defendant and counsel for defendant respectively.

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Assistant Attorney General